Monmouth Care Center *and* SEIU 1199 New Jersey Health Care Union

Milford Manor Nursing and Rehabilitation Center *and* SEIU 1199 New Jersey Health Care Union

Pinebrook Nursing Home *and* SEIU 1199 New Jersey Health Care Union. Cases 22–CA–27287, 22–CA–27830, 22–CA–27290, 22–CA–27291, and 22–CA–27829

April 27, 2009

DECISION AND ORDERS

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 10, 2008, Administrative Law Judge Steven Fish issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondents' exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.

No exceptions were filed to the judge's finding that the Respondents did not violate Sec. 8(a)(5) by eliminating a 40-percent cap in their usage of employees from outside agencies. With respect to the judge's finding that the Respondents violated Sec. 8(a)(5) by failing to meet with the Union and timely and completely provide information to the Union, the Respondents do not except to the judge's findings that the information requested by the Union was relevant or that the Respondents failed to meet with the Union. Instead, they argue only that the judge erred by rejecting their affirmative defenses. We agree that the judge properly rejected those defenses, for the reasons discussed in his decision.

ORDER

A. The National Labor Relations Board orders that the Respondent, Monmouth Care Center, Long Branch, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of the employees in the following unit:

> All employees employed by Monmouth at its Long Branch, New Jersey facility excluding all resident nurses, office clerical employees, supervisors, watchmen and guards.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

In adopting the judge's conclusion that the parties were not at impasse, Member Schaumber does not rely on the judge's statements indicating that impasse could not be found because both parties did not believe that they were at impasse. See *Area Trade Bindery Co*., 352 NLRB 172 fn. 3 (2008). In addition, in finding that the Union did not engage in bad-faith bargaining that excused the Respondents' duties to provide information to, and meet with, the Union, Member Schaumber agrees that, in the circumstances of this case, the Union's naming of Respondents' attorney, David Jasinski, in the original charges did not constitute bad-faith bargaining. In this connection, he notes that the Respondents did not file any charges against the Union in this case. However, Member Schaumber is of the view that, under different circumstances, naming a party's attorney in an unfair labor practice charge might constitute evidence of bad-faith bargaining.

[3] The judge's recommended Order requires the Respondents, upon request, to bargain jointly with the Union at least once a week. The judge acknowledged that there is a lack of support for this remedy in extant precedent. Further, the General Counsel neither requested this remedy before the judge nor alleged that the Respondents are a single employer or joint employers. Under the circumstances, we find that the Board's traditional remedial requirements are sufficient to address the Respondents' violations in this case. In Chairman Liebman's view, however, such a remedy may be worthy of consideration in a future case.

We shall modify the judge's recommended Order and substitute new notices conforming to this traditional language.

(b) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

(c) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(d) Within 14 days after service by the Region, post at its facility in Long Branch, New Jersey, copies of the attached notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Milford Manor Nursing Home and Rehabilitation Center, West Milford, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of employees in the following units:

> Unit I : All employees employed by Milford at its West Milford, New Jersey facility excluding all registered nurses, licensed practical nurses, office clerical employees, supervisors, watchmen and guards.
>
> Unit II: All licensed practical nurses, employed by Milford at its West Milford, New Jersey facility excluding supervisory employees.
>
> Unit III: All registered nurses, excluding only the Director and Assistant Director of Nursing employed by Milford at its West Milford, New Jersey facility excluding supervisory employees.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

(b) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

(c) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(d) Within 14 days after service by the Region, post at its facility in West Milford, New Jersey, copies of the attached notice marked "Appendix B."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Re-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[5] See fn. 4, supra.

spondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The National Labor Relations Board orders that the Respondent, Pinebrook Nursing Home, Englishtown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of employees in the following unit:

> All employees employed by Pinebrook at its Englishtown, New Jersey facility excluding all registered nurses, office clerical employees, supervisors, watchmen and guards.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

(b) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

(c) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(d) Within 14 days after service by the Region, post at its facility in Englishtown, New Jersey, copies of the attached notice marked "Appendix C."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[6] See fn. 4, supra.

WE WILL NOT fail or refuse to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of employees in the following unit:

> All employees employed by us at our Long Branch, New Jersey facility excluding all resident nurses, office clerical employees, supervisors, watchmen and guards.

WE WILL NOT fail or refuse to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and, if an understanding is reached, incorporate such understanding in a written agreement.

WE WILL furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

MONMOUTH CARE CENTER

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of employees in the following units:

> Unit I : All employees employed by us at our West Milford, New Jersey facility excluding all registered nurses, licensed practical nurses, office clerical employees, supervisors, watchmen and guards.
>
> Unit II: All licensed practical nurses, employed by us at our West Milford, New Jersey facility excluding supervisory employees.
>
> Unit III: All registered nurses, excluding only the Director and Assistant Director of Nursing employed by us at our West Milford, New Jersey facility excluding supervisory employees.

WE WILL NOT fail or refuse to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and, if an understanding is reached, incorporate such understanding in a written agreement.

WE WILL furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

MILFORD MANOR NURSING AND REHABILITATION CENTER

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet at reasonable times for the purpose of collective bargaining with the Union as the exclusive representative of employees in the following unit:

All employees employed by us at our Englishtown, New Jersey facility excluding all registered nurses, office clerical employees, supervisors, watchmen and guards.

WE WILL NOT fail or refuse to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and, if an understanding is reached, incorporate such understanding in a written agreement.

WE WILL furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of August 30, September 12, and November 2, 2005; and January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

PINEBROOK NURSING HOME

Laura Elrashedy, Esq., for the General Counsel.
Alex Tovitz, Esq. (Jasinski and Williams, P.C.), of Newark, New Jersey, for the Respondents.
Ellen Dichner, Esq. (Gladstein, Reif and Meginniss), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges, filed by SEIU 1199 New Jersey, Health Care Union (the Union, the Charging Party, or Local 1199), the Regional Director for Region 22 issued several complaints, including a second amended consolidated complaint on April 30, 2007, which alleged that Monmouth Care Center (Respondent Monmouth), Milford Manor Nursing and Rehabilitation Center (Respondent Milford), and Pinebrook Nursing Home (Respondent Pinebrook, and collectively called Respondents), have violated Section 8(a)(1) and (5) of the Act, by failing to meet with the Union for purposes of negotiating a successor collective-bargaining agreement, and by failing to timely provide to the Union, relevant and necessary information. The complaint also alleges that Respondents Monmouth and Pinebrook, violated Section 8(a)(1) and (5) by unilaterally changing terms and conditions of employment by eliminating a 40-percent cap in agency personnel usage.

The trial with respect to the allegations in the complaint was held before me on October 23–26 and November 26, 2007, and January 3 and 14, 2008. Briefs have been filed by Respondents and the General Counsel, and have been carefully considered.

Shortly after the briefs were received, Respondents' counsel submitted a two-page letter, which he requested to be treated and accepted as a reply brief. The General Counsel replied in a one-page letter, responding in part to Respondents' letter, and requesting that the reply brief be stricken, since it was not accompanied by a motion for leave to file such a brief. *Fruehauf Corp.,* 274 NLRB 403 fn. 2 (1985).

However, Respondents did request that I accept the reply brief in its letter, and I believe that this is sufficient. Inasmuch as the General Counsel did respond to the reply brief, in her letter, and the reply brief is short and would not delay rendering a decision, I shall deny the General Counsel's request that Respondents' reply brief be stricken, and grant Respondents' request that the reply brief be accepted. I shall also accept the General Counsel's submission as a reply to Respondents' reply brief.

On the entire record,[1] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondents are all long-term health care facilities, located in Englishtown (Respondent Pinebrook), West Milford (Re-

[1] Subsequent to the close of the hearing, the General Counsel requested the introduction into the record of GC Exhs. 59, 60(a) and (b), and 61. Respondents requested the introduction of R. Exh. 52. Neither party objected to the receipt into evidence of these documents. I therefore receive GC Exhs. 59, 60(a) and (b), and 61; and R. Exh. 52 into the record. Further the General Counsel also submitted after the close of the hearing the charges filed in Case 22–CA–27829, which had inadvertently been left out of the formal papers. I shall also receive these documents into evidence as well.

spondent Milford), and Long Branch (Respondent Monmouth), New Jersey. Each of the Respondents had gross revenues in excess of $100,000 and purchased goods valued in excess of $5000 directly from points outside the State of New Jersey. Respondents admit and I find, that each of them are and have been employers' engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRIOR RELATED CASE

Milford Manor Nursing, 346 NLRB 50 (2005). On January 7, 2004, the Union filed a grievance, alleging that Respondent Milford violated a contractual provision which limited Respondent Milford's use of agency personnel to 40 percent of total staffing. The Union thereafter requested certain information from Respondent Milford, with respect to that grievance.

On January 18, 2005, the Union filed a charge against Respondent Milford alleging that it refused to supply such information. Region 22 issued a complaint on March 31, 2005, alleging that Respondent Milford violated Section 8(a)(1) and (5) of the Act by refusing to supply certain information to the Union.

A hearing was held before Administrative Law Judge Morris on June 7 and 17, 2005, and he issued a decision on August 18, 2005, finding that Respondent Milford had violated Section 8(a)(1) and (5) of the Act, by failing to furnish all of the information requested by the Union, which decision was affirmed by the Board on December 13, 2005. (346 NLRB 50 (2005)).

The decision related that the Union requested information concerning a grievance it had filed that Respondent Milford had violated the provisions of the contract, which provides that Respondent Milford may increase the percentage of agency employees to no more than 40 percent. The judge further found that Respondent Milford thereafter supplied some but not all of the information requested by the Union, and that the Union by Larry Alcoff, sent an additional information request to Respondent Milford, dated July 23, 2004, clarifying what information still had not been provided.

Respondent Milford did not supply the information requested in the July 23, 2004 letter from the Union.

On October 13, 2004, the arbitration commenced. Helen Wrobel, the attorney for the Union, requested the balance of the information requested. Respondent Milford's position was that "they did not have the documents that we had requested. They had provided us with whatever they had. . . . They did not have additional information. . . . It was not kept by them. It was agency records." The arbitrator ruled that Respondent Milford had 30 days to provide the additional information to the Union.

On November 23, 2004, Wrobel wrote to the arbitrator, pointing out that Respondent Milford still had not supplied all of the information requested. A second day of hearing was scheduled for January 31, 2005. At that time, Respondent Milford furnished some additional information, but its attorney stated that they "do not have access to all of the documents." The arbitrator ordered that Respondent Milford was to make available its books and records "for the Union to conduct an audit". The Union never conducted an audit, claiming that it did not have and auditor available to conduct the examination.

Based upon these facts, the judge concluded that the information requested by the Union in its July 23, 2004 letter was relevant. The judge then rejected Respondent Milford's defense, that it had produced all of the information that it had in its possession, but could not produce the information which was in the agency's possession. Citing *United Graphics,* 281 NLRB 463, 466 (1986), he concluded that Respondent Milford had not demonstrated that the information that it did not supply is unavailable, and that it was obligated to request such information from the agencies.

The judge found that Respondent Milford had thereby violated Section 8(a)(1) and (5) of the Act, and ordered it to furnish to the Union the information in its possession requested in the Union's July 23, 2004 letter, and that it "make a reasonable effort to secure the other information requested in the Union's letter, and if that information remains unavailable, explain or document the reasons for its unavailability."

The Board in its decision, affirming Judge Morris's decision, stated in a footnote, that "the record supports the Judge's finding that, at the time the charge was filed on January 18, 2005, the Respondent had not provided the information requested by the Union. Thus, there was an 8(a)(5) violation. To the extent some information may have been supplied later, these matters can be addressed in compliance proceedings."

In the attempt to comply with the Board's Order, Respondent Milford by its attorney, David Jasinski, sent a letter to Julie Pearlman Schatz, the Union's attorney in that case, dated June 1, 2006. The letter referred to documents submitted as attachments, allegedly in compliance with the Board Order. The attachments contained some information regarding agency usage for certain periods in 2003 and 2004.

III. BACKGROUND AND BARGAINING HISTORY

The three Respondents are all managed by the same management company, Gericare, and have the same owners. Eleanor Harris the human resources director for Gericare, serves in that same capacity for each of the Respondents'. David Jasinski has been the attorney for all three Respondents, since the mid- to late 1990s.

All of the Respondents have had a long-term bargaining relationship with the Union, which preceded Jasinski's tenure as attorney for these facilities. When Jasinski began representing the Respondents, the Union representing their employees was Local 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board (Local 1115). Thereafter, Local 1115 was merged into Local 1199 and each of the Respondents continued to recognize Local 1199 after the merger, as well as continuing to apply the terms of the collective-bargaining agreements then in effect between Local 1115 and the Respondents, to their employees employed at their respective facilities.

The record reveals that the parties have never executed a fully integrated collective agreements since the merger. Rather during the bargaining for new contracts, the parties have executed Memorandums of Understandings (MOUs), under which the parties agreed to apply the terms of their prior agreements, (which were the contracts between Local 1115 and the Respon-

dents), as modified by the terms of the MOUs. The prior bargaining was conducted jointly for all three Respondents, and the MOUs executed by the parties, were single documents, executed by Jasinski or Harris on behalf of all three Respondents, as well as by various union representatives and bargaining unit members from the three facilities.

The parties dispute whether or not licensed practical nurses (LPNs) are included in the bargaining units of the three facilities, and as will be detailed below, there was discussion of the issue at several bargaining sessions. Jasinski testified that it was his "understanding" from his involvement with the negotiations at these facilities, that LPNs were not included in the units. Jasinski did not testify as to the basis of his "understanding," or any other evidence that supports such a position, other than the Union never raised the issue during the three prior negotiations that he conducted (1998, 2001, and 2002).

However, I do not credit Jasinski's vague and unconvincing testimony in this regard, since documentary evidence in the record, supports the position of the General Counsel and the Union, that LPNs have been and are part of the bargaining unit at all three facilities.

The MOU signed on August 7, 2001, by Jasinski on behalf of all three Respondents, specifically provides for a minimum rate for LPNs as well as for other classifications. This evidence along would be sufficient to conclude that LPNs were in the units.

Moreover, an examination of the full collective-bargaining agreements, signed by Respondents with the Local 1115, (which the parties agreed to incorporate in the subsequent MOUs), provides further support for this conclusion.

The record includes a collective-bargaining agreement between Local 1115 and Respondent Monmouth, entered into on November 22, 1991, and effective from June 1, 1991, for a period of 4 years, with a provision for an automatic renewal for 4 more years, unless either party notifies the other in writing 9–12 days prior to the expiration. The Agreement also permits, at the option of the Union, the right to renegotiate yearly "wages, hours and general conditions of employment as the Union requests." It further provides for binding interest arbitration in the event of failure of the parties to agree. It also gives the Union the right to reopen the contract in the third year, to negotiate wages and hours, and for binding interest arbitration in the event of a failure to agree.

The unit described in this contract includes "all employees excluding registered nurses, office clerical employees, supervisors, watchmen and guards." Thus, LPNs are not specifically mentioned in the inclusions or exclusions. However, the schedule for wage increases does make specific reference to LPNs, providing for wage increases for LPNs from $5 to $20 per week, on five different dates, between June 1, 1991, and December 1, 1993, as well as different minimum rates for LPNs from $340 to $370 on these dates. Further the Agreement specifies that in November 1992 and November 1993, discussions will be held between Respondent Monmouth and Local 1115 "regarding any rate adjustments from the state of New Jersey to be applied to the December 1992 and December 1993, Licensed Practical Nurse increase."

The record also reflects that on December 1, 1994, an arbitration decision was issued by Arbitrator Leon Reich involving Local 1115 and Respondent Monmouth. The award reflects that on July 18, 1994, the parties entered into a MOU extending their collective-bargaining agreement dated November 22, 1991, through May 3, 1008, with certain modifications. The parties also agreed to arbitrate wages for the LPNs and the Blue Collar[2] employees. The decision further reflects that the wage rate were to be fixed by the Arbitrator within parameters agreed to by the parties and characterized by them as floor rates and ceiling rates. The Arbitrator in his decision provided for $10.00 per week and two $10.00 increases and three $5.00 per week increases on various dates for blue collar employees, and raises of $25, $10, and three $5 per week increases for LPNs on various dates.

The record also establishes that Respondent Milford and Local 1115 executed two collective-bargaining agreements dated October 22, 1990, effective from March 1, 1989, for 4 years. One of the two contracts, specifically covers LPNs only, "excluding supervisory employees," and covers and specifically calls for wage increases for LPNs. The other contract covers a unit including all employees excluding LPNs, RNs, and various other exclusions. This contract and a wage increase portion, divides employee increases into categories of class 1 (identical to class 1 employees on the contract between Respondent Monmouth and Local 1115), and for cooks and assistant cooks.

Finally, payroll records submitted for Respondent Monmouth, revealed that its LPNs had union dues deducted from their salaries, and Harris conceded that the employees in the records, including LPNs submitted were "union employees."

Accordingly, based on the above, I conclude that LPNs were included in units represented by all three Respondents.[3]

IV. THE 2001 NEGOTIATIONS

Prior to 2001, all three Respondents had engaged in a practice of using employees of outside agencies to fill in for bargaining unit employees, on a "need basis." The Union had been aware of the practice, but apparently had not protested, until sometime in 2001, when the Union filed a grievance, protesting this practice at Respondent Pinebrook. The grievance was scheduled for arbitration, while the parties were bargaining for a new contract.

The record does not reveal what provisions of the contract that the Union contended that Respondent had violated by its use of agency employees. The contract between the Union and Respondent Pinebrook had no provision dealing with the use of

[2] The blue collar employees are not defined in the decision. However the contract divides the unit into class 1 employees and LPNs. Class 1 employees includes ward clerks, nurses aides, orderly, attendants, diet aides, dishwasher, kitchen helper, porter, maid, laundry worker, housekeeper, telephone operator and combination receptionist. Class 1 employees appear to be blue collar employees in the award.

[3] Based on this bargaining history, I find that in the case of Respondent Milford, there were separate contracts and separate units. One unit covers LPNs the other all employees except for LPNs and RNs. The record also indicates a third unit including all RNs only was also in existence and that Respondent Milford recognized the Union as the representative for that unit.

agency employees. However, the contract did provide that "no bargaining unit employees work shall be done by a nonbargaining unit employee." The contract also prohibits Respondent from subcontracting unit work without the written consent of the Union.[4]

All three Respondents bargained jointly over the terms of a new agreement in 2001. The issue of the use of agency employees by all of the Respondents was discussed. Jasinski, on behalf of the Respondents, explained that in order to have flexibility, the Respondents needed to continue to use agency employees. The Union recognized this explanation, which was a practice not uncommon in the industry. However, the Union indicated that there should be a cap on the number of agency employees used by the Respondents, and proposed that should agency employees be employed for a period of time, that employees should be placed into the unit.

After back and forth negotiations over these and other issues, the parties on August 7, 2001, executed an MOU, which contained a number of modifications to the prior Agreements, including an agreement on the use of agency employees.

This provision states the "Employer retains the right to utilize Agency personnel to a maximum of 25 % of total staffing and all agency personnel employed after (1) year after the ratification shall become union members after that time."

According to Jasinski's uncontradicted testimony, it was agreed upon during the negotiations that the Union would be responsible for monitoring the 25-percent figure, and that it was his "understanding," that the 25-percent cap would be measured on a 1-year basis.[5]

It was also agreed in the MOU, that the Union would withdraw its pending arbitration with Respondent Pinebrook, which as related above, concerned the use of agency employees.

V. THE 2002 NEGOTIATIONS

The Union, as permitted under the terms of the Agreements, requested reopening of the contracts after 1 year. During these negotiations, which were again conducted jointly, the parties agreed to various modifications of the current Agreements, including an Agreement by all three Respondents to contribute to the Union's health and welfare fund, as well as modification of the agency clause. In that regard, the Respondents proposed and the Union agreed to increase the percentage of agency employees to no more than 40 percent, with all other language to remain the same.

During these negotiations, Stacy Harris who was one of the representatives of the Union at these sessions, specifically agreed with the position of the Respondents, that the 40-percent cap is based on a 1-year period.[6]

The MOU was executed on December 14, 2002, and the contracts were extended to March 31, 2005, for all three Respondents.

Subsequently as I related above, the Union filed a grievance with Respondent Milford, contending that it had violated the 40-percent cap. The grievance was filed on January 7, 2004, and asserted that Respondent Milford had allowed, "more than 40% of Agency workers to work in union positions."

The grievance was set for arbitration, and the arbitration commenced on October 13, 2004. The Union called one witness, an employee who testified that Respondent Milford had used agency employees and also admitted on cross-examination, that some employees at the facility, refused to work overtime, which necessitated that Respondent Milford utilize the services of agency employees.

Respondent Milford, by Jasinski took the position that it had not violated the 40-percent cap and that the calculation of the 40-percent cap is computed on a yearly basis. The Union's attorney, Helen Wrobel, at the time, did not disagree or agree with Jasinski's assertion. She stated that the contractual language is unclear in terms of whether it is calculated on a weekly, monthly, or yearly basis.

During the first day of the arbitration, Wrobel asked Respondent for the balance of the information that it had previously requested. The arbitrator ruled that Respondent Milford has 30 days to provide the additional information to the Union.

On November 23, 2004, Wrobel wrote to the arbitrator, pointing out that Respondent had not supplied all of the information requested. A second day of hearing was scheduled for January 31, 2005, during which Respondent Milford supplied some additional information, but stated that "they do not have access to all of the documents." The arbitrator ruled that Respondent Milford was to make available its books and records for the Union to conduct an audit. As also related above, the Union did not send an auditor, informing Jasinski, that the Union could not afford to pay an auditor to review the books.

VI. THE 2005 GRIEVANCES

In late 2005, the Union filed grievances against all three Respondents, alleging that they violated the contractual provisions that required the Respondents to place agency employees in the unit, upon completion of 1 year's work for each facility. An arbitration hearing was scheduled, but has been adjourned, by agreement of all parties in March 2007, since some of the information requests made by the Union with respect to these arbitrations, are part of the complaint in this case.

VII. THE 2005 NEGOTIATIONS

A. The Union's Perparations for Negotiations

Larry Alcott was an International representative for the Union, with over 20 years' of experience with the SEIU in various capacities. He has negotiated numerous contracts involving nursing homes throughout the country, including 50 or 60 contracts in the State of New Jersey. Alcoff, in late 2004 and early 2005 conducted training sessions for the negotiators for the Union, which included Uma Pimplaskar and Justin Foley, who conducted the initial bargaining sessions with all three Respondents. Alcoff instructed the union negotiators to start off negotiations, by sending "sort of a signal of the direction of bargaining what the goals of the Union were, and what we hoped to accomplish." Alcoff reviewed the goals that the Union was

[4] Pars. 15 and 19 of the contract between Local 1115, and Respondent Pinebrook. Similar clauses exist in the contracts between Local 1115 and Respondents Monmouth and Milford.

[5] Eleanor Harris corroborated Jasinski's testimony as to these issues.

[6] Based on the undenied testimony of Eleanor Harris. Stacy Harris did not testify.

trying to achieve. The goals included minimum standards for wages, affordable health care, which included persuading employers who participated in the Greater New York Fund, to absorb the increases that the Fund had reported to the Union were necessary, and improvements in retirement benefits. At no time did Alcoff tell the negotiators that any of there goals are "non negotiable," and he testified that in fact the Union has not achieved statewide standards at all for employers.

B. The Tuchman Agreement

Morris Tuchman is a labor attorney, who negotiates on behalf of 20–30 New Jersey long-term health care facilities. An Agreement between the parties was in effect, when negotiations for a new agreement commenced in early 2005, and tentative agreement was reached in late April or early May.[7] The new agreement was signed in early June 2005, and it runs from April 1, 2005, through June 15, 2009. Both the new and old "Tuchman Agreement" contained identical "most favored nations clauses." The clause in pertinent part reads as follows:

> *Article 35—Most-Favored-Nations*
>
> 35.1. The Union, having committed itself to achieving better working conditions for all employees in the nursing home industry, represents that it intends to provide the same conditions for workers in all nursing homes with which it has collective bargaining agreements.
>
> 35.2. In the event the Union enters into an collective bargaining agreement . . . on or after April 1, 2005 with a proprietary nursing home in New Jersey which provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the employers, except that this provision shall not apply . . . [listed are exceptions not applicable to the Respondents].
>
> 35.3. This provision will apply only to the net economic impact reflected by the modifications provided for in this Agreement.

Notwithstanding this most favored nations clause in that contract, there has been no assertion made by any of the Employers therein, that the clause has been violated by the Union, requiring a change in their contracts. Further, even among the Employers included in the Tuchman Agreement, there are some different economic terms, with regard to pay and benefits, but no employer has invoked the most favored nations clause in a grievance. The Union has agreed to contracts with numerous employers in the industry, outside of the Tuchman Employer's in New Jersey with lesser wage packages, and where these employers did not participate in the Union's Health Fund. Alcoff explained further that since the clause applies only to "net economic impact," and in the nursing home industry particularly, it is particularly difficult to measure such impact.

C. The Bargaining with Pimplaskar

Pimplaskar represented the Union in the first bargaining sessions for all three facilities. Pimplaskar presented the Union's initial offer, and went over these proposals. According to Jasinski, Pimplaskar stated that there are certain terms that were "not negotiable," and that the Respondents would have to agree to it without any negotiations. The items mentioned in this regard, according to Jasinski were contributions to the Health and Welfare Fund and the issue of agency usage. Jasinski asserts that he responded that this position is bad-faith bargaining, and everything is subject to negotiations.

Pimplaskar did not testify although she had been subpoenaed by the General Counsel.[8]

However, the General Counsel introduced a copy of pages of the transcript in another NLRB trial, Atrium at Princeton, et al., Case 22–CA–27066, wherein Pimplaskar testified on July 10, 2007. In that trial, which involved two nursing homes, also represented by Jasinski, the Respondents therein had introduced testimony from Jasinski, that Pimplaskar in initial bargaining sessions, had stated that some of the union proposals were nonnegotiable, particularly health and welfare and pension contributions. Pimplaskar testified that she did not state that these or any items in the Union's proposals that she submitted were nonnegotiable. She did admit however that she told Jasinski, that the proposals that were submitted were part of the Union's "statewide goals."

Harris testified that she recalled during these initial sessions involving all three facilities, that Pimplaskar, after reading through the Union's proposals contract proposed, stated that these would be "no negotiations" with regard to health care, and some other issues[9] Harris adds that she said to Jasinski, "[I]sn't this the first day of negotiations? How can she say no negotiations?" Jasinski allegedly responded, "I know."

The trial in which Pimplaskar testified was held before Judge Steven Davis on various dates in July and October 2007. On April 15, 2008, Judge Davis issued his decision, finding that the two Respondents therein, Atrium at Princeton LLC d/b/a Pavilions at Forrestal (Atrium) and Princeton Healthcare LLC d/b/a Pavilions at Forrestal (Princeton), violated Section 8(a)(1) and (5) of the Act by prematurely declaring impasse, making various unilateral changes, unreasonably refusing to meet with the Union, and by refusing to supply relevant information to the Union.

Judge Davis, in setting forth the facts of the bargaining session held on February 24, 2005, found that Pimplaskar had stated the "statewide bargaining grievance" committee had met and formulated "goals" for new contracts, and that the Union's proposals reflected those goals.

Judge Davis also recited that Jasinski had testified that Pimplaskar had stated that there were a number of provisions that were non negotiable, including health and welfare benefits and pension contributions. Judge Davis also recited that Pimplaskar denied telling Jasinski that the health and welfare and pension contribution proposals were subject to negotiations. Indeed, Pimplaskar testified that she stated that all the Union's propos-

[7] Alcoff represented the Union in these negotiations with Tuchman.

[8] Pimplaskar was no longer employed by the Union at the time of the trial.

[9] Harris did not recall what the other issues were about which Pimplaskar stated that there would be "no negotiations," and did not remember if agency usage was one of the issues.

als were not subject to negotiations. She also denied that Alcoff told her that she could not deviate from the Union's initial proposals.

Judge Davis also recited that at the next meeting, in March 2005, "according to Jasinski, Pimplaskar repeated that the Union would not entertain negotiations regarding its health and welfare or pensions proposals." Judge Davis's decision did not reflect whether Pimplaskar denied making these comments at the March meeting.[10]

Judge Davis did not resolve the credibility issues vis á vis Jasinski and Pimplaskar, concerning Pimplaskar's alleged statement at negotiations that certain issues were not negotiable. He apparently found it unnecessary to do so, since he concluded that the Union had in fact bargained over these issues, and that it had not bargained to the point to insisting to impasse, on the Union's "goals."

Judge Davis' decision also reflected that following the March 2005 session, Jasinski claimed that Alcoff phoned him, and stated that the Union would get the contract it wanted, "one way or another." Alcoff allegedly insisted that the Union wanted the "master agreement" and regardless of what he (Jasinski) does, the Respondent is "powerless," adding that he should not "waste his time" and that he should not even negotiate. Jasinski responded that he intended to negotiate a contract for the Respondents which will address the needs of the facility and their employees. Judge Davis observed that Jasinski did not mention this call in any letter that he sent to the Union complaining about its alleged bad-faith bargaining.

Judge Davis stated that Alcoff denied having this conversation with Jasinski, and indeed denied speaking to Jasinski about the negotiations with the Respondent before he became the lead negotiator in August 2005. Judge Davis did not resolve the credibility dispute between Alcoff and Jasinski as to this phone call.

However, Judge Davis specifically did not credit Jasinski's testimony that Alcoff stated during negotiations that he could not deviate from the terms of the Tuchman contract because of the most-favored-nations clause in that contract prohibited the Union from giving the Respondents more favorable provisions.

Atrium also presented testimony in that proceeding from Odette Machado, who was the Union's former director of organizing. She testified that prior to the 2005 negotiations, she met with Alcoff and together with the Union's staff, outlined the Union's strategy for upcoming negotiations in New Jersey. Machado stated that Alcoff said that the Union, "had to meet certain standards . . . in terms of what we needed to settle a contract and we couldn't because, . . . we had certain provision in the (Tuchman or master) contract, for example, the most-favored-nations clause that we had to be consistent with what it called for or else the consequence would be that other employers who had a contract, that was cheaper financially would be able to call for the same thing if we reduced the standards." Machado also stated that Alcoff said that the Union could not settle a contract until the contract "met certain standards" including the Benefit Fund, salary and parity increases, and additional sick days and holidays.

According to Machado, Alcoff told the union agents that the David Jasinski represented employers would be considered as one group and identified it as "the bad group" which can't help but be an evil employer "which is taking the Union to a place to the bottom and we cannot meet the standards or get the contracts then we would have to really come down very hard on them."

Alcoff essentially denied Machado's assertions, and testified that the while the Union did have goals and statewide standards that it seeks to obtain in contracts across New Jersey, that there are variations in the Union's success in that regard. He further noted that the Union has agreed to contracts that did not meet these goals or standards, and the goals or standards were not required of any employers at bargaining. Alcoff further mentioned several nursing homes where the Union negotiated contracts in 2005, which differed from statewide standards, and contained no Benefit Fund provisions. Alcoff further added that Machado herself had negotiated a contract with Wellington Nursing Home which did not meet the standards for statewide bargaining.

Judge Davis discredited Machado's testimony and credited Alcoff where their testimony conflicted in these areas, principally because Machado had run unsuccessfully for union president and had been discharged by the Union, and had formed a rival union which filed a petition to represent the employees of the Respondent therein. Thus, Judge Davis concluded that her testimony was affected by her adverse interest to Alcoff and the Union.[11]

D. Justin Foley Takes Over the Bargaining on Behalf of the Union

On or about April 1, 2005, Justin Foley replaced Pimplaskar as the lead negotiator for the Union. Jasinski testified that around that time (April or May), he had a telephone conversation with Alcoff. According to Jasinski, Alcoff introduced himself, and informed Jasinski that he "was going to get what he wanted in this contract negotiation, and that it would be a fruitless exercise on our part to try and negotiate a contract that deviated from the agreement that they were negotiating with the Tuchman group and he was going to get what he wanted one way or the other."

Alcoff denied having any phone conversation with Jasinski concerning these negotiations at that time. Alcoff asserts that his only phone conversation with Jasinski related to another facility, Saint Lawrence, wherein they discussed an issue related to the union-security clause. He added that his next contact with Jasinski was at the first negotiation session that he attended, in June 2005.

On May 11, 2005, a bargaining session was held at Respondent Monmouth. Justin Foley was the negotiator on behalf of the Union, and was accompanied by Norman DeGeneste, a union business agent. Jasinski and Harris were present on behalf of Respondent Monmouth.

[10] An examination of Pimplaskar's testimony at the trial, reveals that she was not asked about the events at the March meeting, and that therefore she did not deny Jasinski's testimony as to what Pimplaskar allegedly said at that meeting.

[11] Machado did not testify in this proceeding.

Prior to that session, Jasinski had sent identical letters to Foley, with respect to all three Respondents. The letter requests additional information from the Union, and discusses an arbitration award, which dealt in part, with an issue according to Jasinski of viability of the Funds. Jasinski referred in the letters to an alleged position taken by the Union's trustees at that arbitration, and added as follows: "This position by the Union's trustees, coupled with the Union's bargaining position that any proposals regarding the Funds and the Employer's contribution to such Funds are non-negotiable, concern us."

Foley responded to Jasinski's letters, by a single letter referring to five facilities including the three involved here.[12] In that response, Foley discussed the information requests made by Respondents, as well as those made by the Union, and requested scheduling of dates. Foley made no reference in his letter to Jasinski's assertion that the Union's bargaining position had been that proposals relating to the Funds were "nonnegotiable."

Foley did testify in this proceeding, as well as before Judge Davis, that the Union never took such a position during bargaining. Foley testified before Judge Davis, but not here, that he did not respond to Jasinski's assertion in this regard, because "it seemed false on its face."[13]

Jasinski testified that Foley at this session at Respondent Monmouth, as well as at several other sessions involving other unspecified facilities, took the position that "his hands were tied. That there were certain things that were not negotiable; that he could not deviate because he constantly referred to the Most-Favored-Nations clause that was negotiated in the Morris Tuchman contracts that if he gave it to us he would have to have given it to everyone else in the industry and they would not do that." Foley as noted, denied ever stating during negotiations that any proposals from the Union were "nonnegotiable."

Foley began the meeting by requesting that Respondent Monmouth agree to sign an extension of the recently expired collective-bargaining agreement. Jasinski did not give a definite response to that inquiry. The parties then discussed respective information requests that each side had previously made of each other. Jasinski asked about several pieces of information that he had requested from the Union, and that had not been received. Foley replied that the Union would do its best to get the missing information to Respondent Monmouth as quickly as possible.

Foley advised Jasinski that Respondent Monmouth had not fully complied with the Union's prior information request, and that the Union needed that information to continue the collective-bargaining process. The record does not reflect Jasinski's response to Foley's request to supply the missing information, nor whether Foley specifically told Jasinski what information still had not been supplied.

In that regard, the Union had sent a letter dated January 20, 2005, to Respondent Monmouth, requesting 24 different items of information. Respondent Monmouth supplied most of the information requested, prior to the initial bargaining session conducted by Pimplaskar on behalf of the Union. However, according to Foley, and not denied by Jasinski, Respondent Monmouth did not supply, by the May session, any information covered by items 19–21 of the request, which involved information relating the usage of agency employees, including the names of agencies used by Respondent Monmouth as well as the number of hours worked by agency employees, per diem employees, and or no frills employees over the past 3 years, on a quarterly basis, broken down by job classification.[14]

The parties then turned to a discussion of the Union's proposal that had been previously submitted. There were a few agreements on some minor clerical provisions, such as adding a cover page, changing the name and address of the Union, and an agreement on the Union's request to add sexual preference to the no discrimination article in the prior agreement. After the parties discussed the proposed changes by the Union to the union access and visitation clauses, Jasinski stated that Respondent Monmouth wanted the Union to present a full economic package, before it would engage in a discussion of economic items,[15] since it did not wish to negotiate piecemeal.

Thus, Respondent Monmouth would not discuss items that it characterized as economic, such as the Union's proposals for additions in bereavement leave and leave for marriage, and increases in payment to the Union's Benefit Funds.[16]

The bulk of the meeting was spent discussing the Union's proposal on agency employees. This proposal sought to eliminate Respondent Monmouth's 40-percnet usage of agency employees, and instead, limit agency usage to fill for temporary openings and temporary staffing needs. The proposal also provides that if temporary or agency employee works regularly for 90 days, that employee shall be made permanent and be included in the bargaining unit.

Jasinski responded that this proposal would be a big change for Respondent Monmouth's operations and that the use of agency employees was important for the current operations of the facility. Jasinski also explained to the Union why the current 40-percent policy was necessary, essentially stressing Respondent Monmouth's need for flexibility and the need to insure full staffing. Foley responded that the Union did not believe that having 40 percent of bargaining unit work done by agency employees is in the best interests of the Union's members or in terms of continuity of care, and the Union is seeking to change this in the bargaining process.

After this meeting, Foley sent a letter to Respondent Monmouth (as well as the other two Respondents), following up on previous requests for information, that had not been provided,

[12] Foley was also the lead negotiator for Laurel Bay and Pavilion at Forrestal. As noted above, Pavilion at Forrestal was the subject of Judge Davis's decision.

[13] Judge Davis did not resolve this credibility dispute between Jasinski and Foley with respect to the issue of whether the Union had during bargaining stated that Funds issues were "nonnegotiable."

[14] I note that the complaint does not allege that Respondent Monmouth violated the Act, by refusing to supply information requested in the Union's January 20, 2005 letter.

[15] The Union's proposal did not include any wage increases or minimum rates. It stated, "[P]roposal pending fulfillment of information requests related to current wages and wage policies."

[16] The Union's proposal requested payments of from 21 to 24 percent of gross payroll to the Local 1199 Benefit Fund.

including information relating to the use of agency employees, plus a new but somewhat related request for information asking for the number of hours that non bargaining unit employees have worked in bargaining unit jobs, by job classification, for 2002–2005.

Also included along with this letter was a spreadsheet prepared by Foley, based on information provided by Respondent Monmouth, as well as some assumptions made by Foley, of the Respondent's costs.

On May 18, 2005, Jasinski faxed a counterproposal from Respondent Monmouth to Foley. The proposal responded to the Union's proposal in part, and in part stated that with respect to what it considered economic items, Respondent Monmouth would provide proposal "after the Union submits a total and complete package."

The first bargaining session wherein Foley conducted the bargaining at Respondent Pinebrook, was held on May 16, 2005. The session began with a request by Foley to bargain the three facilities together, as had been done in past years. Jasinski rejected that request, because each Respondent was a separate facility. Foley then asked for a contract extension, as he had in the session with Respondent Monmouth, and Jasinski on behalf of Respondent Pinebrook, did not respond to this request, but clearly did not agree to extend the contract.

The parties then discussed their respective information requests. The Union supplied to Respondent Pinebrook "a fair amount," of the information it had requested.

Foley informed Jasinski, as he had during the Respondent Monmouth session, that the Union still had not received all the information that had been requested in its prior letter. The record does not reflect Jasinski's response at that time.

The parties then went over the Union's proposal, which was substantially identical to its proposal submitted at the negotiation session with Respondent Monmouth. The bargaining over this proposal, was similar to the bargaining at Respondent Monmouth. Respondent Pinebrook agreed to the Union's proposals on changing the name and address of the Union, adding a cover and table of contents, and adding sexual preference to the no discrimination article. The parties also discussed the issue of union orientation, wherein Respondent Pinebrook asserted that this was already happening, but Foley still asserting that the Union's proposal stood. There was also discussion of the Union's proposal on agency employees. Jasinski stated that the agency's proposal of the Union is "a big problem."

On May 17, 2005, Jasinski sent a letter to Foley, asserting that Respondent Pinebrook had complied with the Union's information request in March, and was advised at that time by the union representative (Pimplaskar), that no further information is needed.[17] Foley replied by letter of May 21, 2005, dealing with all three Respondents, plus Laurel Bay and Pavilion at Forrestal, other facilities, represented by Jasinski. Foley referred to his previous letter to Jasinski dated May 13, 2005, detailed above, wherein Foley specified which items of information had not been supplied, with respect to Respondent Monmouth. Foley mentioned Jasinski's request made at all the facilities, that the Union submit an "economic proposal." Foley stated that "the information that we requested back in January is important to our being able to do so. We anticipate your compliance with this requests."

Jasinski replied to this letter, by sending five identical letters to Foley, one for each facility. The letter criticized Foley for lumping together the five facilities in his previous letter. Jasinski observed that these facilities are separate corporations, with different interests, and we "will not be negotiating collectively." Jasinski added, "[W]e trust that you will recognize and respect our position and all future request will be addressed to the needs and interest of the individual facility."

The next bargaining session between the parties took place on June 3, 2005, at Respondent Monmouth. Foley once again requested that Respondent Monmouth supply it with information that had been requested. Foley noted that the missing information involved details concerning Respondent Monmouth's use of agency employees. The record does not reflect Jasinski's response, but it is clear that no additional information was turned over by Respondent Monmouth at that meeting.

The only issue discussed at this meeting was the agency issue, since the meeting lasted only a half hour, due to a previous commitment by Respondent Monmouth. Jasinski explained that the use of agency personnel works for Respondent Monmouth, and that it provides flexibility for the facility. Jasinski explained that if the facility is short staffed on a particular day, because no one is available they can quickly fill the spot by calling an agency. Foley asked Jasinski if Respondent Monmouth had difficulty hiring employees. Jasinski replied that they "had not really had trouble hiring." Foley suggested that Respondent Monmouth take a closer look at the proposal that the Union had provided, which Foley felt contained flexibility to accommodate Respondent Monmouth's concern.[18]

The next bargaining session involving the parties was at Respondent Milford on June 13, 2005. According to Jasinski, at this session, Foley repeated what he had also stated at his first session bargaining for Respondent Monmouth and Respondent Pinebrook, that his (Foley's) hands were tied, there were certain things that were not negotiable, and the Union could not deviate because of the most-favored-nations clause in the Tuchman contract. Foley as noted denied ever stating that any items were nonnegotiable. Foley asked about extending the contract, for 60–90 days. Jasinski replied that Respondent Milford would not sign a contract extension and would not do so in the future.

Foley then asked about the Union's information request concerning agency personnel. Jasinski replied that Respondent Milford had provided to the Union information on agency personnel in a previous arbitration. Foley replied, that was relevant information that the Union needed since the arbitration. Foley asked for agency information for the past 6 months. Jasinski answered that Respondent Milford would provide that information to the Union.

Foley on behalf of the Union presented a written proposal, which was virtually identical to the proposals previously sub-

[17] Jasinski sent an identical letter to Foley with regard to Respondent Monmouth.

[18] Note that the Union's proposal permits the use of agency employees to fill in for absent unit employees.

mitted by the Union at the session involving Respondent Monmouth. The parties reviewed these proposals, and Jasinski on behalf of Respondent Milford presented Respondent Milford's counterproposal. This counterproposal was, with a few minor exceptions, virtually identical to the counterproposal submitted by Respondent Monmouth to the Union on May 18, 2005. Both of these counterproposals stated that there would be no change in the agency-personnel clause in the prior agreements.

The parties then discussed Respondent Milford's counterproposal. When the agency issue came up, Jasinski explained as an additional reason for retaining the prior agency provision, that at Respondent Milford, there was a problem with employees refusing overtime, necessitating the use of agency personnel. Foley asked Respondent Milford how it implemented the hiring of employees from A-Best (one of the agency's used). Jasinski explained the process. Later on during a caucus, several bargaining unit employees explained to Foley that the process was not being implemented, as had been explained, and that in the opinion of the unit employees, Respondent Milford did not "respect" the 40-percent cap.

On June 15, 2005, 2 days later, the parties met for a negotiation at Respondent Pinebrook. Foley began this session, as he had in other meetings involving the other Respondents', and asked about the information still outstanding.[19] Jasinski replied that Respondent Pinebrook would provide the missing information at the next meeting.

The parties discussed the issue of the use of agency personnel. Jasinski reiterated what he had said in other sessions about how important the use of agency employees was, in that it provided Respondent Pinebrook with flexibility, and the opportunity to call someone in, if the census went up or if there was a refusal to work overtime.

Foley asked how the Union could properly monitor the amount of unit work done by agency employees, and reiterated that the Union needed the information in order to determine if Respondent Pinebrook was complying with the contractual provisions with regard to agency usage. Foley added that the outstanding information requests, represents "in essence" bargaining unit money that was being spent, and that Respondent Pinebrook's failure to supply such information is slowing down the bargaining process. Jasinski responded that Respondent Pinebrook did not have the information readily available, and added that he did not know whether Respondent Pinebrook was in compliance with the contractual provisions regarding use of agency personnel.

Foley stated that although the Union still needed the outstanding information, it would present an economic proposal, to avoid further delay. The economic proposal was presented, along with a document by Foley, which he viewed as incorporating all the prior agreements of the parties. The economic proposal included three wage increases of 4 percent a year, plus parity increases, which incorporated minimum rates for various classifications, including $22 per hour for the LPNs. The proposal also requested on increase in health insurance contributions to 22.33 percent of the payroll. These proposals were reviewed, and discussed, as was the proposal submitted by Respondent Pinebrook.[20]

On June 29, 2005, the parties met again at Respondent Pinebrook. In addition to Jasinski, Harris, Foley, and Business Agent DeGeneste, Alcoff attended this session, to see for himself how negotiations were going.[21] Foley began the meeting by once again asking for the outstanding information, which Respondent Pinebrook had agreed to provide by this session. Jasinski replied that Respondent Pinebrook did not have the information requested.

At that point Jasinski presented the Union with an economic proposal, which supplemented the proposal previously submitted by Respondent Pinebrook. The proposal provides for wage increases of 3 percent on September 1, 2005, and 2.5-percent increases on September 1, 2006, April 1, 2007, September 1, 2007 and September 1, 2008. It also provided for a merit pay proposal, at Respondent Pinebrook's sole discretion, a no-frills rate for CNAs of $11.50, and $23 for LPNs. With respect to the Funds, the proposal called for no contributions to the Union's treasury and education, alliance and legal funds, pension contributions for employees who complete 1 year of employment, of $.20 per hour for hours worked up to 37.5 hours per weeks, and health insurance contributions of 22-1/3 percent of pay for hours worked up to 37.5 hours per week. The proposal also contained some changes in the union activity and visitation clauses of the prior agreement.[22]

Foley asked several questions about Respondent Pinebrook's proposal, which were responded to by Jasinski. Alcoff then requested a caucus. During the caucus, Alcoff informed Foley that he felt that Respondent Pinebrook's proposal was "a real FU proposal," and that the proposal was "hostile," and that when an Employer gives such a proposal "they're sending a message." Alcoff instructed Foley to ask Jasinski, "[W]hat the hell he's doing." Alcoff and Foley then met with the bargaining committee, and went over Respondent Pinebrook's proposals. Foley explained to the committee that the proposal was very far from the Union's proposal on the table.

The Union returned to the bargaining table, and Foley told Jasinski that Respondent Pinebrook's proposal was a "slap in the face" and an "insult," and was "outrageous," and was not intended to reach an agreement.

Jasinski replied that it was a serious and fair proposal, and that he did not appreciate that characterization. At that point, the Union requested a side-bar meeting with only Jasinski, Harris, and Foley present. Alcoff told Jasinski that Respondent

[19] I note that prior to this meeting, Foley had in two letters set to Jasinski in May, specifically mentioned what information was still missing.

[20] This proposal was virtually identical to the proposals that had been submitted by Respondents Milford and Monmouth to the Union.

[21] Foley had reported to Alcoff that bargaining wasn't going well, and Alcoff wanted to see for himself if the Union was missing a signal.

[22] The proposal, unlike the prior agreement, forbid employees from engaging in union activity, including distribution of literature, which could interfere with the performance of work during working time or in working areas, and required union representatives to seek permission from Respondent Pinebrook to enter the facility and speak with employees. Further this proposal modifies the bulleting board clause, to state that any notices posted therein, "shall not contain anything that is disparaging in any way to the Employer or any of its representatives."

Pinebrook's proposal was an "FU" proposal, and that he did not understand what their agenda was and why they would make such proposals. Alcoff specifically mentioned some examples, such as the proposal to modify the bargaining unit[23] and the union visitation clause.

Alcoff added that Jasinski needed to decide whether he wanted to have a deal and a relationship with the Union or not. Alcoff also explained that the Union had mostly good relations with employers in the industry, had reached deals with these employers, and that the Union has carried the political order for the industry, by putting a human face on the for-profit industry with regard to regulation and reimbursement issues, and that nursing homes were profiting from the Union's efforts. Alcoff then asked, "[W]hy would you pick a fight with us?" Jasinski responded that he wasn't picking a fight, but was simply making a proposal.

Jasinski also accused the Union of being slow in coming up with its economic proposal. Alcoff reminded Jasinski that the Union was still waiting for information from Respondent Pinebrook. Alcoff told Jasinski that he wanted negotiations to move forward, and asked Jasinski to give an indication of what he felt was the problem. Jasinski answered that the Union's agency usage proposal was the problem at all three facilities. Foley explained that the Union's proposal was necessary, because there was a lot of bargaining unit work being done by agency employees. Alcoff suggested that Respondent Pinebrook consider how the problem could be solved based on the proposals that were on the table. Alcoff suggested another off the record meeting, involving only Jasinski, Harris, Alcoff, and Foley. Jasinski, after consulting with Harris, agreed to participate in such a meeting.

Harris testified that at this side bar meeting on June 29, Alcoff stated that the Union wanted the same agreement as the Tuchman agreement. Both Foley and Alcoff deny that Alcoff had made any such statement during the June 29 side-bar meeting. Jasinski did not testify that Alcoff made such a remark during this meeting.

The "off the record meeting" discussed on June 29, was held in early July at the Union's office. Foley, Alcoff, Jasinski, and Harris were present.[24] Alcoff began the meeting by suggesting that in the interest of moving negotiations forward, the parties should combine negotiations for all three facilities, while reminding Jasinski that there was a history of such combined bargaining, while signing separate contracts. Jasinski responded that the three facilities had separate interests and he explained some of the differences, such as the fact that Respondent Monmouth had very different financial conditions than the other facilities. Jasinski stated that he was not interested in negotiating collectively, and he wished to continue to negotiate separately.

Alcoff then suggested that the same individuals continue to engage in "off the record" discussions on a joint basis, and then bring back the agreements reached to the three separate negotiations. Jasinski replied that he would consider that suggestion and get back to the Union if that was a viable possibility.

Alcoff then asked Jasinski what was the real road block to reaching an agreement at all three facilities. Jasinski responded that the agency issue was the number one issue and the number one concern. Alcoff replied that he didn't understand why the Employers wanted to use agency employees to the extent that they do. Alcoff explained that based on his 20 years' of experience in negotiating nursing home contracts, most employers in the industry agree with the Union, that using agency personnel is a bad idea, and that it is not a good way to provide care and run a business. Alcoff added that using agency personnel, "made no sense to me," and that the parties ought to be figuring out how to have a permanent work force.

Jasinski responded that it was part of the culture of these facilities, that it worked for these facilities, and that they were not interested in changing it in a fundamental way. Alcoff replied that it was insane for the prior union leadership to have agreed to a provision, allowing the use of 40-percent agency personnel, and added that these individuals who so agreed were no longer with the Union, because they agreed to these types of provisions. Jasinski countered that Alcoff was not there in the prior negotiations, and does not know what was going on or what the circumstances were. Further, Jasinski stated that he felt that it was inappropriate for Alcoff to attack these individuals.

Alcoff repeated his assertion that he didn't understand the motivation behind these facilities extensive use of agency personnel, based on his experience with other employers. Alcoff referred to the fact that other employers in the industry had informed him that it was more costly to use agency personnel (even taking into account the cost of benefits), because it is necessary to pay more money to the agency, than it would cost to use unit employees. Jasinski did not dispute Alcoff's assertion as to cost, but in reply repeated his assertion that this is the culture these facilities are comfortable with, and they do not want to change it.

Jasinski also stated that one of the reasons for the facilities need to use agency personnel, is the fact that the Union's members do not want to work overtime. Alcoff answered that there are other ways to address the issue of overtime. Alcoff gave some examples, such as strategies to recruit and retain staff, and using incentives and systems for creating overtime. Alcoff suggested setting aside the agency issue, and concentrate on the other outstanding issues. Alcoff said that he was sure that if the parties could created good will around the rest of the contract issues then they could figure out how to take the agency issue and accommodate both the Employers' and the Union's concerns. Jasinski answered that he would consider Alcoff's approach and would get back to the Union.

Jasinski testified that at this meeting, as well as at another unspecified meetings, Alcoff said that the Union could not deviate from the terms of the Tuchman agreement, because of the most-favored-nations clause, and if the Union gave a better deal to the Gericare facilities, the Union would have to give it to all the other Employers. Alcoff denied making any such

[23] Respondent Pinebrook made a proposal to modify the unit to state that part-time employees eligible "to participate and receive benefits and employer required contributions under this contract are defined as those employees who are regularly scheduled and work thirty (30) hours or more per week."

[24] Also present at this meeting was Milly Silva, president of the Union.

comments at this or any other meeting.[25] Alcoff did admit that at the July "off the record meeting," he did comment that the Union had achieved wage increases and wage rates in other units, as well as getting Employer's to absorb health care and pensions increases, and was seeking similar increases in these negotiations. Alcoff also admitted that in several unspecified sessions involving Respondent Pinebrook and Respondent Milford, he stated that the Union had obtained wage increases, and fund contribution increases from other Employer's, including those involved in the "Tuchman" negotiations.[26] Alcoff explained to Jasinski that the Union had helped to obtain state legislative relief for these employers, and obtain these benefits for their workers. Alcoff added that these Employer's were able to provide these increases, so why would Respondents want to take it out on their workers, and explain to them why they are not worth it. Jasinski replied that he wasn't claiming that the employees weren't working or worth it, but that he was not interested in what Tuchman Employers agreed to. He is interested in what this Employer (Respondents Milford and Pinebrook), are doing, and wants to negotiate over what these Employer's should be paying. According to Alcoff, and not disputed by Jasinski, the Tuchman Agreement never came up in the course of discussing the agency issue, and the Union never took the position that Respondents should accept the Union's agency proposal, because it appeared in the Tuchman agreement.

Alcoff also provided testimony that it would be highly unlikely that any of the Tuchman Employer's would invoke the most-favored clause even if the Union had agreed to less favorable terms with these Respondent's. Thus, the Tuchman Agreement contains 20 separate economic attachments, each containing varying terms concerning wages, days off, health insurance enrollment with no single standard of pay or benefits. Secondly, the most-favored nations clause in the Agreement speaks in terms of "net economic impact," which is difficult to establish particularly in a nursing home setting. Third, in order to establish net economic impact, Employers would need to turn over and compare proprietary economic data. Further, Alcoff's unrebutted testimony establish that the most-favored nations clause has never been invoked by any "Tuchman" employer, and that when the Gericare facilities increased agency usage from 25 to 40 percent, no Tuchman Employer filed a grievance about it or raised the issue with the Union.

Moreover, agency was not a major issue in the Tuchman negotiations or among Tuchman Employers. There was an issue involving "no frills employees," which was utilized by Tuchman employers, and which was an issue during negotiations. Indeed the provisions agreed upon in the Tuchman agreement treated no frills employees, temporary employees, and agency employees the same way, although they are not the same. One employer in the Tuchman group, did not agree to this provision, and went to interest arbitration. That employer obtained a different language from the arbitrator with respect to agency and no-frills usage.

Furthermore, Alcoff named 13 New Jersey nursing homes, all of which entered into contracts after the Tuchman Agreement was reached, and which (unlike the Tuchman Employers), did not participate in the Union's Funds. The Union subsequently has entered into many other contracts containing less favorable usage and benefit terms than in the Tuchman Agreement.

This meeting concluded by Alcoff asking whether Jasinski wanted to proceed with a negotiation session previously scheduled for July 8 with Respondent Monmouth, or continue with the off the record discussion. Jasinski replied that he wished to proceed with the meeting on July 8 at Respondent Monmouth.

On July 8, the meeting at Respondent Monmouth was held as scheduled. This session began with Foley, once again advising Jasinski that Respondent had yet to fully comply with the Union's information requests dealing with the use of agency personnel. Jasinski replied that the Union would get the information at some point.

Foley then presented Respondent Monmouth with a copy of its economic proposal, which was similar to the proposal that had previously been presented by the Union to Respondent's Pinebrook and Milford. Foley briefly went over the proposals to make sure that Respondent Monmouth understood the numbers. Jasinski said to Foley, "Yeah, we've seen this. You know generally how we feel about it."

The parties did discuss the Union's proposal on payments to the Benefit Fund. In that regard, the Union's initial proposal, submitted to Respondent Monmouth on May 11, 2005, called for contributions of 21 percent of gross payroll of all unit employees into the Benefit Fund,[27] which rate could be adjusted by the trustees to as much as 24 percent of payroll during the agreement. The proposal submitted by the Union on July 8, provided for a payment of 22.33 percent of payroll effective July 15, 2005. This proposal did not provide for increases over the life of the Agreement if the trustees felt it necessary, as the Union's prior proposal had included. Foley explained at the session that the Union was presenting Respondent with two options with regard to health contributions. Thus, the Respondent could still accept the May proposal of 21 percent with the possibility of increases to 24 percent over the life of the agreement, or a fixed rate of 22-1/3 percent. Foley indicated to Respondent Monmouth, that the Union was "indifferent" as to which proposal Respondent Monmouth accepted.

The July 8 proposal also contained a slight modification of the Union's May proposal with respect to pension contributions. The May proposal asked for contributions of 2-1/2 percent of earnings for each unit employee into the Pension Fund.

[25] Foley corroborated Alcoff's testimony and testified that he (Foley) did not hear Alcoff make any such remarks. Harris, in her testimony, makes no mention of the Tuchman Agreement being raised during this meeting.

[26] Although the parties did make reference to the "Tuchman Agreement," technically there is no such single agreement. Although the negotiations were conducted jointly with the Union for numerous Employers by Tuchman, each Employer involved entered into separate signed agreements with the Union, which were not always identical to each other. For example interest arbitration was included therein, and some Employer's took advantage of that clause to arbitrate and obtain different contractual terms from the Union with respect to certain issues.

[27] The Benefit Fund provides health coverage to employees.

The July 8 proposal asked for contributions of 2 percent of payroll effective July 15, 2005, and up to 2-1/2 percent on March 1, 2008.

The Union also made a modification of its prior proposal on a temporary or agency employee, by eliminating the requirement in the May proposal that "[i]f a temporary employee is scheduled on a regular basis for ninety (90) calendar days or more, then the employee shall be made permanent and be included in the bargaining unit." Foley explained to Jasinski that the Union had modified its prior proposal in this respect.

The meeting ended with no agreements, and a discussion of the possibility of agreeing on a date for the next session. However, the parties could not agree on a specific date.

On July 15, 2005, Foley sent a letter to Jasinski. The letter made reference to all Respondents, referring to them as Gericare, and stated that the Union had not heard back from him about their side-bar discussion. Foley asked that the parties schedule bargaining meetings for July 27, 28, and 29. The letter suggested Jasinski call Milly Silva directly at the Local office to followup on this. Foley did not explain in this letter why he had suggested that Jasinski call Silva to set up new dates. The reason was that Foley had resigned from the Union effective July 15, 2005.[28]

Before he left, Foley drafted an exit memo to Silva, reporting on the status of negotiations with Respondents. The memo refers to Jasinski as "enemy name and contact." The memo also emphasizes that the Union had continuously requested information from Respondents, and he (Jasinski) promised it numerous times, but we've never gotten it." Additionally, the memo states that the language proposals of the Respondents "aren't that bad," but that their proposals "on eliminating daily overtime, merit pay, etc. are." Foley also reported to Silva that at the sidebar discussion, after "they put down the dumb proposals at Pinebrook," he and Alcoff told Jasinski to "rethink his approach if he wanted to come to deal." Finally, Foley added that "Jasinski admits that the Agency issue is going to be the problem in solving these contracts."

E. Alcoff Replaces Foley as Lead Negotiator for the Union

Alcoff became the lead negotiator for the Union, after Foley resigned. The first meeting that Alcoff attended in that role, was on August 12, 2005, at Respondent Monmouth. Present on behalf of the Union, in addition to Alcoff, was Silva, De Geneste, and Pedro Martinez, union shop steward. Jasinski and Harris once again represented Respondent Monmouth. The union representatives arrived late, because Silva was not felling well that day. Alcoff began by again requesting information that had not been provided, specifically dealing with LPNs. Jasinski replied that the Union did not represent the LPNs, and claimed that since he began representing Respondent Monmouth, it was his understanding that LPNs were not included in the unit and the Union had never raised the issue. Alcoff replied that he had reviewed prior agreements in the Union's files, which did make reference to LPNs.[29]

The parties discussed the issue of the use of agency personnel. Alcoff asserted that this was the biggest issue, and the Union still needed information that it had not received, particularly in regard to new hires in the last 6 months. Alcoff added that it seemed to the Union that the only employees being hired were agency personnel. In that regard, Martinez claimed that his brother had applied for work at Respondent Monmouth, and was told at Respondent Monmouth's facility, that he would be hired as an employee of A-Best.[30] Martinez added that when people are hired by Respondent Monmouth as A-Best employees, that they have no choice about becoming part of the Union. Martinez added that it seemed to him that "before long it would be all A-Best there."

Alcoff then asked both Harris and Jasinski how the hiring process worked at Respondent Monmouth. Both Harris and Jasinski replied that they did not know.

The parties then discussed Respondent's proposal on overtime, which led to a discussion on how overtime was assigned, and generated into the issue of a grievance previously filed by Martinez over overtime assignments.

Jasinski asserted that at this session, he mentioned prior statements allegedly made by Pimplaskar and Foley about terms not being negotiable and about the Tuchman Agreement and the most-favored nations clause. Alcoff replied that he was there to negotiate a contract, and is not going to deal with what other people said. According to Jasinski, Alcoff stated that the Union is looking to standardize the contract and get every employer to comply under the same terms and conditions that was negotiated under the Tuchman Agreement. Alcoff denied that this issue come up at any of the Respondent Monmouth sessions, but as noted above admitted that during Respondent Pinebrook negotiations, he did say that the Union had reached agreements with other employers, the people are doing the same work, and asked how could Respondent Pinebrook justify paying the employees less. He added, "We just reached an agreement with these 20 over here, these 12 over here. . . . I brought it up in the context of framing the goals and standards."

One week later, on August 19, 2005, the parties met at Respondent Milford. Alcoff, DeGeneste, and Union Representative Terry Harkin were present on behalf of the Union. The Union also decided to bring 20–25 employees from all Gericare facilities to attend this session. Alcoff explained that he had felt that since there had been coordinated bargaining n the past, and the proposals on the table from Respondents' were the same at each facility, that having employees present from all three facilities would expedite the process.

Harris became upset at the presence of employees from the other facilities, and told Jasinski that she wanted to cancel the session. Jasinski told her that the Union could bring anyone it

[28] In his letter to Foley, did not mention that he was leaving the Union, or that he was stepping down as a chief negotiator.

[29] The recognition clause in the previous contracts, neither includes or excludes LPNs. However, various other parts of the agreements do make reference to LPNs, including the 2001 MOU, which covered all three Gericare facilities, and addressed LPN wage rates.

[30] A-Best is an agency that supplies employees to all three Respondents.

wanted to the table, and convinced Harris to proceed with bargaining.

Jasinski stated that he did not object to employees being present, but reiterated that he had not agreed to coordinated bargaining and he was just there to bargain for Respondent Milford.

Alcoff presented the Union's modified economic proposal, which was applicable to all three facilities. Jasinski reiterated his prior position that he was not interested in joint bargaining, and was there only to bargain for Respondent Milford. Alcoff explained that he understood that, but that he was alerting Jasinski, and that Jasinski would see the same proposals when the parties bargained at the other facilities.

Alcoff then went over the Union's proposals, and explained why he felt that the proposals represented movement on the part of the Union. Alcoff explained that the Union's was proposal of 12-percent increases moved the date of the increases back 4 months. Additionally, the Union's August 19 proposal although still asking for a total of 12 percent over the life of the contract, provided for split increases, which Alcoff asserted would lessen the economic impact on Respondent Milford.

Jasinski responded that he felt the Union's proposal was regressive, since it also provided for "party" increases, which that could in some cases, result in higher wage increases. Alcoff disputed Jasinski's assertion that the Union's offer was regressive, and they argued about that issue. Jasinski contends that Alcoff added that he was going to get Respondent to the rate that everybody else gets, and that "this is what the Tuchman group got and this is what they're going to agree to."

The parties then discussed the Union's Benefit Fund contribution proposal. Alcoff explained that the Union had modified its prior proposal, by moving the effective date of the increases back 4 months, modifying the definition of gross payroll, and by providing Respondent Milford with more stability, and less exposure. The new proposal of an increase of 22.33, as opposed to the previous offer of increases from 21 to 24 percent depending on the Trustees, Alcoff explained, presented less exposure to Respondent Milford, since the initial proposal could have resulted in an increase of up to 24 percent a month after the contract was ratified. The Union also proposed for the first time a cap on LPN and RN rates for contributions.

The parties also discussed the agency usage proposal, and Alcoff explained that the Union's new proposal modified its prior proposal of an immediate elimination of the 40-percent agency usage. The new proposal permits Respondent Milford to continue to utilize agency personnel up to 40 percent of the unit's employees for the first year of the contract. Over the remaining years of the contract, the proposal calls for gradual reductions in the percent of agency employees used, from 30 percent, to 20 percent and finally to 15 percent by March 1, 2008. Alcoff explained that this proposal would allow Respondent Milford to phase in the reduction of the use of agency personnel, and that the Union hoped that the improved wage rates proposed by the Union, would enable Respondent Milford to be able to recruit and retain staff, and it would have less and less of a need to hire agency personnel.

Jasinski replied that he had repeatedly stated that agency usage had existed at this facility for a long time, the Union had never objected to its use, and Respondent Milford was not interested in changing the 40-percent figure. Jasinski added that Respondent Milford wanted to maintain the 40-percent use of agency personnel, so it could "save money."

Jasinski also testified that Alcoff commented with respect to the Union's entire proposal, "This is what we are going to propose. This is what we are going to get."

In this regard Respondents note that in several respects the Union's proposal submitted on August 19, 2005, mirrors the Tuchman Agreement. For example with respect to the agency usage issue, the Union proposed that by the end of the contract Respondent Milford "shall be allowed to utilize Agency personnel up to a maximum of fifteen percent (15%) of the bargaining unit's total employees." The Tuchman Agreement states that "Each facility per diem/no frills or temporary (including agency) employees may utilize up to a maximum of fifteen percent (15%) of the hours worked in each department."

Respondent Milford also points to another clause in the Tuchman Agreement, which it argues also applies to agency employees, and which states as follows:

> The Employer shall reduce the utilization of such employees by a cumulative amount of five percent (5%) every six (6) months of this Agreement until the Employer is brought into compliance with the fifteen (15%) cap.

However, in my reading of this contract, it is not all certain that the reference to "such employees" in this provision includes agency employees. Thus, article 22 of the contract, is entitled "Per Diem/No Frills and Temporary Employees." However, some of the provision of the article clearly refer only to per diem and no-frills employees, including provisions setting forth contractual provisions covering such employees' pay, seniority, pension contributions, holiday pay, and their right to be subject to the grievance procedure. Further, the article provides that each current per diem/no-frills employee shall be given 30 days to change status to "Frilled" employees. It adds that such employees who do not change status, shall be grandfathered and subject to the contract as outlined, and the contract then adds the clause referred to above requiring the Employers to reduce the utilization of "such employees" by 5 percent every 6 months. Thus, it appears to me that "such employees" in this section refers to per diem/no-frills employees, who receive no benefits under the contract.

Further there are other significant differences between the Union's proposal and the Tuchman Agreement. The Tuchman Agreement states that "Per Diem/No Frills and Temporary (including Agency) employees shall be used on an on-call, as needed basis only to substitute for regular scheduled employees during their absence on non-working benefit days (sick leave, Union days, holidays, personal leave days or vacation)." There is no such requirement or provision in the Union's proposal regarding no-frills or agency employees. The Tuchman Agreement also provides that "the Employer shall not use Agency personnel for any shift unless there are no bargaining unit employees, including Per Diem/No Frills employees available and willing to volunteer to work the shift in question regardless of whether the shift results in overtime pay." There is no such provision in the Union's proposal.

Both the Union's proposal and the Tuchman Agreement do require the Employer to make every reasonable effort to offer work to bargaining unit employees before utilizing agency employees, and to provide the Union with a monthly report regarding the use of agency employees.

Respondent also point to the wage increases in the Union's proposal of 3.0 percent on August 1, 2005, 2.5 percent on August 1, 2006, 2.0 percent on March 1, 2007, 2.5 percent on August 1, 2007, and 2 percent on March 1, 2008, as being identical to the wage increases provided in the Tuchman Agreement Respondent is correct in that assertion. However, the record also discloses several differences between the Union's proposal and the Tuchman Agreement including provisions regarding parity increases, shift differential, and time-and-half for LPNs working two floors.

The Union's proposal on contributions to the Benefit Fund was identical to the Tuchman Agreement in the amount of (22.33 percent of payroll), but the Union's proposal provided for increases effective September 1, 2005, while the Tuchman Agreement required the increases to be effective June 15, 2005.

Finally, Respondent Milford contends that the contributions to the Pension Fund are "substantially identical," in the Union's proposal and the Tuchman Agreement. I agree. Both the Union's proposal and the Tuchman Agreement provide for initial increases of 2 percent of earnings, per employee, upon completion of such employee's probationary period, and increase to 2 percent, 2.5 percent of earnings, effective March 1, 2008.[31]

After the parties completed their discussion of the Union's proposal, Jasinski presented Respondent Milford's economic proposals. The proposal provided for wage increases totaling 12 percent over the life of the contract, which was nearly identical to the increases, requested by the Union. However, the proposal did not address the Union's demand for parity increases, and did provide for merit pay at the sole discretion of Respondent Milford, which decision (to grant or not grant to particular employees) shall not be subject to the grievance procedure.

The proposal also created a new "no-frills" rate of $11.50 per hour for CNAs.

With respect to contributions to the Benefit Fund, Respondent Milford agreed to the Union's proposal of 22.33 percent of pay, but added the condition of up to 37.5 hours per week, as opposed to a percentage of gross payroll.

Respondent Milford also proposed that it make no contributions to the training and education, alliance, and legal funds. Respondent Milford also offered to pay for all full-time employees, 20 cents per hour for all hours worked up to 37.5 hours, into the Pension Fund.

On the agency issue, Respondent Milford's proposal states as follows:

> During the term of the Agreement, the Employer shall have the right to utilize agency personnel up to 40% of the total work force based only on total hours worked in the facility on a yearly basis. No other conditions.

After a caucus, during which Alcoff characterized to the committee, the proposal as "horrible," the parties discussed in detail Respondent Milford's proposal. Jasinski brought up the fact that Respondent Milford's wage proposal of 12-percent raise was consistent with the Union's proposal. Alcoff commented that Respondent Milford did not address the Union's demand for parity increases, which would bring new employees up to standard rates. The parties discussed how Respondent Milford would calculate starting rates, and Alcoff asked if Respondent Milford had granted merit increases in the past. Jasinski replied that he did not think so. Alcoff asked why the proposal gave sole discretion to Respondent Milford and took the decision out of the grievance procedure? Jasinski answered, "[T]hat's our proposal."

The parties discussed Respondent Milford's proposal to eliminate payments into the training and education, alliance, and legal funds. Alcoff commented that employees needed the training and education fund in order to move up and advance, they needed the legal fund for legal representation for personal issues, and that the alliance fund helped advocate for more nursing funding from the State. Jasinski replied that Respondent Milford wanted to eliminate payments into all of these Funds, and pointed out nobody had taken advantage of the training and education fund.

Alcoff asked about the no-frills employee proposal, Jasinski said that this was a new category of employee, who would receive no benefits at all. Alcoff asked if it would apply to workers, regardless of seniority, and Jasinski answered, "Yes." Alcoff flatly rejected Respondent Milford's proposal to create a new category of no-frills employee.

The discussion turned to the issue of LPNs and Jasinski stated that there was no proposal for LPNs because they were not part of the unit. Alcoff replied that LPNs were in the unit, and that prior agreements had included these employees in the unit, and LPNs have been represented by the Union.[32] An LPN employee by Respondent Milford, present at the meeting, pointed to an old contract that she had in her hand, stating that she was in the Union. Alcoff stated that Respondent Milford had deducted dues from LPNs' salary and had made contributions to the Union Funds on behalf of LPNs. Further an employee member of the committee who was present, Carla Carter, was an LPN, and Respondent's Milford's records indicate that dues were deducted from her salary, as well as for another LPN Louise Doyle, for the Union.[33]

[31] The Tuchman Agreement provides that the pension increase is effective June 15, 2005. The Union's proposal does not mention an effective date for the pension increase. As noted above, the proposal does provide for increases to the Benefit Fund to be effective on September 1, 2005.

[32] In this regard, the MOU, executed in August 2001 by the parties covering all the Gericare facilities, provided for minimum rates for LPNs of $14 per hour. The record also includes a separate collective-bargaining agreement between Respondent Milford and the predecessor Union to Local 1199 dated October 22, 1990, with a unit of all LPNs.

[33] Foley previously submitted a proposal to Respondent Milford which had crossed out LPNs. Alcoff opined that this was a mistake, and that Foley had copied the unit in the blue collar contract. As noted above, the prior contract with Local 1115 included LPNs in a separate agreement, covering LPNs only.

Alcoff indicated that the Union had requested an extra $1 increase for LPNs, in part because it was a way to eliminate the need for Respondent Milford to use agency employees. Alcoff stated that he had anecdotal evidence that LPNs in the unit were being paid $1 less than A-Best LPNs who were working there. Thus, Alcoff contended that the best way to recruit and retain staff, is to have meaningful increases, and agency employees would not be needed. Jasinski insisted that Respondent needed to retain the right to use agency employees. Alcoff responded that this was not good because the agency employees are doing the same work, and should receive the same benefits. Alcoff also reminded Jasinski that Respondent Milford still has not fully completed the Union's outstanding information request concerning agency workers. One of the workers in the room was a CNA, who was an A-Best employee. He stated that he wanted to be in the bargaining unit, but could not do so, according to Respondent Milford. Further, committee members stated that when an agency employee is hired, the employees are handed an A-Best application by Respondent Milford officials, and the individual would be hired an A-Best employee and supervised and scheduled by Respondent Milford. Alcoff asked Harris a series of questions pertaining to the hiring process, such as who gives out applications, and whether applicants are given A-Best applications by Respondent Milford officials. Harris responded to each of Alcoff's questions that "she did not know." Alcoff seemed skeptical of these responses, and stated Harris was the director of human resources, "how could she not know the answers to these questions?" Harris continued to insist that she did not know the answers to Alcoff's questions. Some committee members chimed in that Harris was not telling the truth and that she knows what happens.

After this discussion ended, Jasinski announced, "[T]his is our final offer." Alcoff responded, "How can it be your final offer? First of all it's your first offer, and second of all there's been no negotiations on it, and you haven't given us any of the information on Agency personnel. You're not proposing anything on the nurses." Alcoff then asked, "How could you call this a final offer? There's nothing . . . I mean nothing's happened."

Jasinski repeated, "[I]t's our final offer." Alcoff repeated that the Union still had outstanding information requests, that the Union still needed questions answered about Respondent Milford's proposal, and that the parties should continue to negotiate and set additional bargaining dates. Jasinski responded that he did not have his calendar with him, but he would get back to Alcoff concerning scheduling additional bargaining sessions.

On September 12, 2005, the parties met at Respondent Pinebrook. Present on behalf of the Union were Alcoff, DeGeneste, and Union Representative Allen Sable. Employees from both Respondents Monmouth and Pinebrook were also present. Jasinski and Harris once again represented Respondent Pinebrook. The meeting began by Alcoff again asking for additional information that he requested in his August 30, 2005 letter to Jasinski. Jasinski indicated that the A-Best information was not relevant and was just a stall tactic by the Union. Alcoff replied how could it not be relevant when the central fundamental question raised is the use of agency personnel. Jasinski finally indicated that he would be supplying some information, some did not exist, and some information it did not have. Jasinski added that if the Union is interested in the information regarding the agency personnel, it could subpoena the information from the agency itself.

Alcoff then gave Jasinski a copy of the same proposal it had submitted to Respondent Milford on August 19, and said, "[H]ere it is for Pinebrook." Alcoff added that the Union could not make dramatic changes in its proposals, until it receives all the information it sought, but he pointed out that the Union had moved the effective date for several fund contributions. He emphasized that the Union was "trying to show movement," but it was hard to give a full proposal, when the Union had not received information on the item (agency) "that you yourself have defined as an obstacle."

Jasinski then presented a proposal similar to but slightly modified from the proposal submitted by Respondent Milford on August 19, 2005. The proposal called for slightly higher wage increases of 13 percent, but extended the contract to 42 months as opposed to 39 months, and the increases started on September 1, 2005, as opposed to August 1, 2005, in the proposal submitted by Respondent Milford. Additionally, under the no-frills rate, Respondent Pinebrook proposed a rate of 23.5 percent for LPNs, while there was no such rate in the proposal of Respondent Milford.[34] Other than these changes, the proposals of Respondent Milford and Respondent Pinebrook were identical.

After a brief discussion of the proposal, Jasinski asserted that this was Respondent Pinebrook's final offer and that the parties were at impasse. Alcoff responded, "[W]e are not at impasse," and Jasinski repeated his assertion, "[Y]es, we are." Alcoff asked, "[H]ow could we be at impasse when you're not providing information on those things you're identified as the central thing? How could we be at impasse when we haven't done any bargaining? It's just you drop a proposal and you're . . . there's no engagement on your proposals or our proposals. . . . How could you be at impasse?" Jasinski continued to insist that the parties were at impasse, and Alcoff continued to disagree. Finally, Alcoff stated, "I'll look forward to getting the information from you and we'll have to schedule other sessions."

At some point during this meeting, the Union caucused with members of the bargaining committee, which included Gloria Archer, the shop steward for the Pinebrook facility. During the caucus, Archer as well as fellow employee Gene Dalton requested that the Union allow a vote on Respondent Pinebrook's final offer. Alcoff responded that the Union would not schedule a vote, because he wanted all the facilities (including Monmouth and Milford) to have their contracts run out at the same time. Archer replied that she didn't work for Milford or Monmouth, but worked at Pinebrook, and she did not see how it would be better for the Pinebrook employees if all these contracts ran out at the same time.

Alcoff also informed Archer and the committee, that the employees at Pinebrook deserve the same pay for doing the same

[34] Indeed, as noted above Jasinski took the position during Respondent Milford's negotiations (as well as Respondent Monmouth), that LPNs were not included in the units.

work that the Union won is these other contracts, including the Tuchman Agreement. Alcoff added that the employees were in the same Union, paying the same union dues, and the facilities were getting $1 million and there is no justification for them not doing this. Alcoff concluded by asking, "[D]on't you think you're worth it, why should we settle for less, why should you accept less."

Archer and Dalton were the only committee members who stated that they were in favor of having vote on Respondent Pinebrook's offer. The rest of the committee members agreed with Alcoff, that the Union should not present the offer to a vote of the employees. Thus, the Union did not conduct a vote of unit employees on the offer.[35]

In a separate conversation, the date of which is not disclosed in the record, Archer asked DeGeneste why the employees could not have a vote on Respondent Pinebrook's offer DeGeneste replied that Larry (Alcoff) wanted all the facilities to go out together, and also if the Union agreed, they would have to allow 28 nursing homes to reopen their contract negotiations.[36]

On November 3, 2005, the parties met once again, this time in the presence of Mediators Charles Davis and Wellington Davis. The session began by the parties informing the mediators of the latest proposals on the table. Alcoff then asserted that the Union had still not received information from Respondent Pinebrook that it had requested, including information concerning the use of agency personnel, turnover and a copy of the current collective-bargaining agreement. Jasinski responded that Alcoff's requests were a delay and stall tactic and were not sincere. He added that there was no reason that the Union needed the information, and Alcoff was not interested in getting a contract, but he (Alcoff) had his own plan and strategy.

After a caucus, the mediators suggested a side-bar discussion. Alcoff stated that he wanted to figure out how to get to a deal. He stated that the agency issue was still the biggest problem. Alcoff made several "what if" suggestions, but no formal proposal. One suggestion was the parties live with the status quo and "manage the agency thing," by compromising on other issues such union access. Alcoff also indicated since Respondent Pinebrook had an "unspoken agenda," as to avoid paying benefits, he suggested a 1-year probationary period for all new hires.

Jasinski responded that he was sick of Alcoff, that Alcoff was a liar and could not be trusted. Jasinski added that Alcoff had a scheme to not get a contract, and it was all about the most-favored nations clause. Jasinski also stated that he was sick of the information requests and the parties were at impasse.

The mediators asked Alcoff to make small moves, otherwise the parties would be at impasse. Alcoff replied that they were not at impasse, since Respondent Pinebrook had still not provided information on the central issue, and he was not interested in bargaining "with myself." Alcoff stated that he was available to meet every date between then and Christmas, except for Thanksgiving and Christmas day. He asked the mediators to be present as well. Alcoff repeated this offer in front of Jasinski. The meeting ended without an agreement for a new date.

Subsequently, Alcoff contacted Davis to see if he had heard from Jasinski about Alcoff's offer to schedule additional sessions. Davis replied that he had not been contacted by Jasinski about such rescheduling.

Alcoff sent a letter to Jasinski, dated December 28, 2005, offering 9 different days in January 2006, to bargain for any of the three Gericare facilities. Jasinski did not respond.

Alcoff followed up with another letter of January 19, 2006, referencing all three facilities, in which Alcoff stated that Jasinski had not responded to his December 29, 2005 letter, and offered all dates between February 4 and March 2, 2006, for bargaining.

Jasinski did not respond to this letter, and no negotiations were scheduled in 2006.

On February 23, 2006, the Union filed its initial charges, alleging that all three Respondents had refused to meet and negotiate over a new collective-bargaining agreement. Subsequently, the Union filed a number of amended charges against Respondents, adding allegations of refusals to supply information.

On August 3, 2006, the Union received a petition signed by employees of Respondent Pinebrook, in July 2006, "requesting that Larry Alcoff and Milly Silva not represent us in our contract negotiations." The letter also requested "other representation to do our contract." The Petition also stated that the employees "no longer want SEIU 1199 to be our Union. Therefore we are de-certifying you from our shop." The document was faxed to the Union by Roberta Egerton, the Union's shop steward at the time, with the following comments, "[W]e are not happy with your services." The Union did not respond to this letter.[37]

On September 14, 2006, Egerton signed on RC Petition on behalf of a union named Local 707 Health Employees Alliance Rights and Trades, to represent employees at Respondent Pinebrook. Machado was also listed on the petition as a representative of this Union. This petition has been blocked by the instant charges and complaint. The Region issued a complaint and a first amended complaint, on July 26 and August 17, 2006, respectively, alleging that all three Respondents refused to meet with the Union and refused to supply relevant information to it, in violation of Section 8(a)(1) and (5) of the Act.

On October 31, 2006, Jasinski sent the following letter to Alcoff, with respect to Respondent Pinebrook.

> Dear Larry:
>
> We write you as the Employer's designated representative and labor counsel for Pine Brook Care Center. At the last bargaining session, after a number of bargaining ses-

[35] The above findings based on a compilation of the credited potions of the testimony of Archer and Alcoff.

[36] Based upon the credited and undenied testimony of Archer, DeGeneste did not testify.

[37] In late 2005, and early in 2006, there was an internal union election in which Odette Machado was running against Milly Silva for union president. The Union was aware that most of the employees at Respondent Pinebrook, supported Machado in this election

sions with several different representatives of the Union, even with the involvement of two State mediators, the Union again was unwilling to provide any counter-offer. From the outset of the negotiations, you and other Union representatives have set the stage that a number of items were not negotiable based on the Most-Favored Nations Clause negotiated by other employers, or the Union considered the issue beyond discussion, *i.e.,* participation in the Union's benefit funds. For example, the Union has repeatedly taken the position that the Employer has no option and must join its Health Plan and make contributions of at least 22.33%. Accordingly, out last best offer represented a final offer that addressed the needs of this facility and its employees—a position the Employer consistently took throughout the contract.

Early in these negotiations, the employer provided the Union with all of the documents responsive to its information requests. Indeed, at the bargaining table, the Employer confirmed that the Union had all of the information it needed to proceed forward in the negotiations. Nonetheless, you did nothing more than ask for the same information. Your request for duplicative information further represents the Union's delay tactics and abuse of the process. That request—coupled with your unyielding bargaining position because of the Most-Favored Nations Clause negotiated with other employers—reflect you bad faith bargaining tactics.

Moreover, you have been previously made aware of the employee petition stating that they no longer want the Union representing them. In fact, they have expressed continued dissatisfaction that the Union is permitted to enter the premises. In fact, the last time a Union representative entered the premise, a major disruption occurred. It is clear that the employees do not want the Union representing them anymore. We will not violate any laws by negotiating a contract with a Union who does not represent the employees.

Notwithstanding that the parties are at impasse, and your continued bad faith bargaining tactics, we would be willing to schedule a meeting with the Union to discuss this matter in more detail provided the employees want you to represent them. As we have in the past, all we are requesting is a confirmation that you represent the employees, and that the employees wish you to remain as the Union's negotiator. You can appreciate the sensitive position placed upon the Employer by this petition.

Please advise in writing your response.

Alcoff responded to Jasinski's letter with respect to Respondent Pinebrook, by letter dated December 1, 2006. This letter reads as follows:

Dear David:

I am in receipt of your October 31, 2006 letter concerning Pinebrook collective bargaining negotiations. Your letter is replete with misrepresentations concerning what has taken place in bargaining.

First, you state the parties are at impasse. We are and were not at impasse; we reviewed the open issues at our last session and, as noted above, the Union is prepared to present counters as soon as you provide all of the requested information. Further, you have never presented the Union with a written "last, best, and final offer". I don't think anyone knows what your current proposal in bargaining is, including your client.

Second, you accuse the Union of acting in bad faith by making requests for information. You have never provided information or responded to questions regarding the use of agency personnel. On June 23, 2006, we also requested an updated list of employees, wage rates, hours worked, benefit time, etc. because the last time we received information concerning bargaining unit employees was a year earlier. None of this information has been provided.

In off-the-record discussions with the mediators, we offered to modify every proposal on the table in order to get to an agreement. You sat there silent and refused to respond. The "most favored nations" clause in other contracts has become your oft-repeated excuse to cast blame and refuse to bargain in good faith.

Finally, the Union continues to be the exclusive bargaining representative of the employees. The discontent over the lack of progress in these negotiations, shared by the Union as well as employees, is a result of your continued unfair labor practices.

The Union welcomes the resumption of collective bargaining negotiations that we have been trying to schedule since last year. I am available to meet during the weeks of December 12th and 19th. I reiterate, however, that I need updated, current information requested in my June 23, 2006 letter. Please let me know what dates during the two-week period offered are acceptable or whether you have alternative dates to propose.

For the Members of SEIU 1199NJ,
Larry Alcoff
SEIU

Jasinski replied to Alcoff by letter of December 20, 2006, in which he agreed to meet with the Union, and suggested meeting during the week of December 2006 or the first week of January 2007. This letter is set forth below:

Dear Larry:

Your latest letter is nothing more than a continuation of your pattern and practice to distort the truth with misstatement and outright lies. We ask that you cease such actions. At the last session, we presented the Union with a "final offer." It was rejected by the Union. You are the latest in a string of Union representatives who supposedly represented the employees by reportedly stating that you could not and would not deviate from the contract negotiated with the Tuchman Group. Your proposals merely confirmed your preconceived positions that you never intended to negotiate in good faith. Ms Odette Machado, who had first-hand knowledge of your intentions, confirmed that you were not negotiating in good faith and never intended on negotiating a contract that addressed the

interest of PineBrook [sic] and its employees. The Union members are the real losers in your game-playing.

We are willing to give you another chance. If you are interested in negotiating in good faith, I suggest you review our proposal which included a substantial wage increase. With regard to your information request, we have provided you with the same information at the commencement of the negotiation. Your request is a common tactic which you use to delay the negotiation process. Again, resulting in our employees and your Union members suffering. We suggest that you stop the game-playing. You may come to realize that the negotiation is not about you. Rather, it is about our employees. From the beginning, our goal was to negotiate a contract that represented the interests of this facility and its employees.

Nevertheless, we will, once again, provide you with the information you requested. In the meantime, we request a copy of the Union's Health Care Plan, including but not limited to a summary plan description and all financial records evidencing the financial viability of the Plan – we have grave concerns about the management of these Funds. We understand that there has been a unilateral change in the provider as well as the level of benefits, a change which is prohibited under the expired collective bargaining agreement. We suggest a meeting to discuss our proposal during the week of December 26, 2006 or the first week in January, 2007. Please advise of your availability.

Subsequently, the parties agreed upon January 24, 2007, to meet at Respondent Pinebrook. In addition to Jasinski and Harris, Attorney Alex Tovitz was present on behalf of Respondent Pinebrook. Marvin Hamilton and Hector Pena, union representatives attended, along with Alcoff. The parties began the meeting by exchanging information. The Union provided information to Jasinski with respect to the Benefit Fund.

After reviewing that information, Jasinski criticized various aspects of the plan, including an annual cap of $100,000, and asked why the Union offered such a "terrible plan"? Alcoff replied that the Union was not wedded to this plan, and suggested that Respondent Pinebrook make a proposal for a different plan. Jasinski replied that "oh that's new, we've never heard that before."

Neither Jasinski nor Alcoff made any proposals for a different health plan.

Alcoff then pulled out his June 23, 2006 letter requesting additional information. Alcoff advised Jasinski that 90 percent of the request had not been complied with. Alcoff went over each point in the letter. Jasinski replied either "put in writing" or we give you what we have, and "move on." Alcoff answered that he had already put his request in writing. Jasinski countered by demanding that Alcoff put in writing any request for information that the Union hadn't received.

Alcoff mentioned that Respondent Pinebrook had not submitted any information with respect to LPNs. Jasinski answered that the Union did not represent LPNs. Alcoff responded that the Union did represent the LPNs and Jasinski demanded that Alcoff "prove it." Alcoff read an old recognition clause, which defined the unit as all employees, excluding registered nurses and others, but no specific mention of LPNs. Jasinski countered that the clause did not say that LPNs are included. Alcoff replied that the LPNs are in the body of the contact, and again Jasinski demanded "prove it." An employee of Respondent Pinebrook pulled out an old contract, which mentioned LPNs in the wage article and in another section. Jasinski made a big deal of the fact that Alcoff couldn't prove it, and Alcoff responded, "[I]t doesn't matter, it seems to be true."

The parties then discussed Agency usage. Alcoff asked if there were any agency personnel working in the dietary department, since Respondent Pinebrook had not provided information as to this classification or LPNs. Jasinski responded that he did not know. At that point an employee committee member named Niema, who was employed in the dietary department, stated that eight out of eleven employees in the dietary department were A-Best employees. Jasinski replied that he had no knowledge of that assertion. Alcoff answered, "[Y]ou need to provide the information, you can find out." Jasinski replied, "[P]ut it in writing."

Alcoff then asked if Respondent Pinebrook was in compliance with the 40-percent rule concerning agency usage. Jasinski responded that they were. Alcoff also asked how the 40-percent figure was calculated. Jasinski answered that you have to look over a 1-year period.

Alcoff then suggested that since employees have not received a raise since 2004, that Respondent Pinebrook implement the 3-percent wage increase it had proposed retroactive to August 2005. Jasinski responded that Respondent Pinebrook would grant a merit increase. Alcoff tentatively agreed to that idea, but asked to see the proposal in writing. Jasinski agreed to do so. Alcoff asked to schedule another meeting, but Jasinski replied that he did not have his calendar, and that he wanted to resolve the merit bonus issue before having another meeting. Alcoff said, "[F]ine."

Subsequently, there was a number of correspondences between the parties, regarding the merit bonus. The Union agreed to the implementation of a longevity bonus for Respondent Pinebrook's employees by Alcoff's letter to Harris dated March 22, 2007. The merit bonus was implemented by Respondent Pinebrook.[38]

Jasinski testified that he agreed to a meeting on January 17, 2008, for Respondent Pinebrook, after a call from Marvin Hamilton. The record does not reflect whether that meeting occurred as scheduled, nor what transpired at such a meeting.

VIII. THE REQUESTS FOR INFORMATION AND THE ALLEGED FAILURE TO MEET AND BARGAIN

On August 30, 2005, Alcoff sent identical letters to Jasinski, requesting information from all three Respondents the letter reads as follows:

Dear David:

[38] The record does not establish precisely when the bonus was paid, nor how many employees received such a bonus. No merit bonus was proposed by the Union for or paid by Respondent's Monmouth or Milford to their employees.

The Union is preparing a comprehensive counter-proposal on the remaining open issues. We request the following information in order to draft our counter-proposal:

1. All information ordered by the NLRB in Case 22–CA–26745 regarding the use of Agency personnel;

2. A list of all A-Best employees including, name, job title, shift, date of hire by A-Best, first date of work at Milford Manor, all hours worked in each calendar year since first date worked at Milford Manor, current wage rate, any benefits provided, address/city/zip/home phone number, and social security number;

3. Any memoranda or employee handbook outlining the policies of A-Best;

4. A list of all employees hired in the past six (6) months, including name, job title, years of service in the industry and job category, the starting rate of pay for each employee;

5. Any wage survey conducted by the employer as a basis for the proposal of establishing minimums based on years of service in the industry and job category;

6. Any written policy on merit pay/bonuses, a list of the factors to be evaluated in determining merit pay/bonuses, and any evaluative measurement that shall be used in determining merit pay/bonuses;

7. Any correspondence from the Employer to the Union proposing merit pay since 2002; and,

8. Cost in each year of the contract of the Merit Pay proposal and basis for determining said cost.

Further, the Union again requests for at least the third time from our initial request the following items:

a. Documents describing tuition or training reimbursements available to employees in the bargaining unit;

b. A complete copy of cost reports submitted, including supplemental submissions, for reimbursement for Medicaid and from any other public entity or funding source for the years 2002, 2003, and 2004;

c. Total gross annual payroll for the bargaining unit.

Please provide this information no later than Tuesday, September 6, 2005.

For the Members of SEIU 1199NJ.
Larry Alcoff
Chief Negotiator

Respondent by Jasinski replied to Alcoff, with respect to Respondent Monmouth, by letter dated September 8, 2005, as follows:

Re: Monmouth Care Center and SEIU 1199NJ
Contract Negotiations

Dear Larry:

As the chief negotiator, we are responding to your letter dated August 30, 2005. From the inception of this negotiation, the Union has engaged in stall and delay tactics with the clear intent of never intending to negotiate in good faith and reaching a contract that addresses the needs of this facility and its employees. We have been confronted with at least three (3) different chief negotiators. Now, the Union's latest information request is just another example in stall and delay tactics. The employer responds as follows:

- Monmouth Care Center was not a party to the NLRB Case No. 22–CA–26745. Requesting such information is irrelevant and has absolutely no relevance to the issues for this negotiations.
- There has never been a grievance or an allegation of any violations of the collective bargaining agreement. Through the chief negotiators, there was never been a suggestion of any violation of the collective bargaining agreement. In the latest negotiations, your Union agreed to the right of the employer to retain up to 40% of agency personnel in the workforce. We have complied with the contract as evidenced by the failure to file a grievance. This request after months of contract negotiations is irrelevant to the contract negotiations and intended to stall and delay contract negotiations.
- Wage surveys are conducted by several Associations—we are not in possession of such information.
- No written policy exists as it relates to merit pay/bonuses. Merit pay is based on overall performance of the employee. All work performance factors including reliability, dependability, nursing skills and care, cooperation are just some of the typical factors considered in determining whether a merit pay/bonus is warranted. These factors are evenly weighed by the employers.
- No correspondence exists between the Employer and the Union.
- No specific costs exist for merit pay proposal since it is discretionary and based on the employees' overall performance. No documents exist describing tuition or training reimbursement.
- Copy of cost reports for this facility are available to the Union via the Staff. Indeed, during the course of these negotiations, the Union made reference to these cost reports. Therefore, we suspect you are merely requesting information which is already in your possession. Another example of delay tactics which are not intended to reach a labor agreement.
- Finally, total cost of payroll was provided to the Union's negotiations committee. Nevertheless, we will provide this information again to you.

This latest attempt of requesting irrelevant information is a continued pattern and practice of delay. The only ones who are being hurt by your tactics are our employees. We request a negotiation session convenient with the schedules of all parties where the Union will make a proposal that differs from the proposal the Union has proposed from the beginning-the agreement negotiated by other parties. This employer has been consistently faced with an intractable position by the Union as evidence by statements

made at the table that the Unions' proposal is because of the existence of other contracts and provisions in those contracts. We are not negotiating with other employers. We recommend that you cease such tactics which will only hurt our employees and the facility.

Please contact us for dates this week to continue negotiations at this facility.

Very truly yours,
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

On September 9, 2005, Jasinski responded to Alcoff concerning Respondent Pinebrook. The letter is essentially identical to his response with regard to Respondent Monmouth, but adds that at the next session scheduled for Pinebrook on September 12, he expects the Union will "make a proposal different from the standard proposal that the Union has proposed from the beginning the agreement negotiated by other parties."

The record does not reflect whether Respondent Milford responded to the Union's August 20, 2005 information request.

At the September 12, 2005 Respondent Pinebrook negotiations, the parties discussed the Union's information request and Jasinski's responses. One of his responses, as reflected above, was that the Union if it was interested in obtaining certain information, could subpoena it from the agency.

By letter dated September 12, 2005, Alcoff summarized the discussion at the meeting with respect to information.

RE: Pinebrook

Dear David:

Despite your continuous attempts to declare impasse and talk over me in negotiations at Pinebrook today, the Union stated very clearly that we could only make modest changes to our proposal until we receive the remaining information that we have requested. Upon receipt of the information, the Union is prepared to modify its proposal. Here is my understanding of what you owe us in information and what you stated regarding when it will be provided:

1. The same information ordered by the NLRB in Case 22–CA–26745 regarding the use of Agency personnel for Pinebrook; You stated that it will not be provided because you believe it is irrelevant. We disagree, we are entitled to this information.

2. A list of all A-Best employees including, name, job title, shift, date of hire by A-Best, first date of work at Pinebrook, all hours worked in each calendar year since first date worked at Pinebrook, current wage rate, any benefits provided, and address/city/zip/home phone number; You stated it was irrelevant and that the information is not readily available. It is relevant to the current bargaining and we are entitled to it.

3. Any memoranda or employee handbook outlining the policies of A-Best; You claim that you have no knowledge of its existence. We are entitled to it and you can request it of the Agency.

4. A list of all employees hired in the past six (6) months, including name, job title, years of service in the industry and job category, the starting rate of pay for each employee; You stated that you will provide this information by 9/20.

5. Any wage survey conducted by the employer as a basis for the proposal of establishing minimums based on years of service in the industry and job category; You stated that you are not relying on any such surveys and do not have any in your possession.

6. Any written policy on merit pay/bonuses, a list of the factors to be evaluated in determining merit pay/bonuses; You stated that there is no policy, no measurement took, and that you would be willing to take it off the table if the Union asked.

7. Any correspondence from the Employer to the Union proposing merit pay since 2002; You stated that there never has been any such correspondence.

8. Cost in each year of the contract of the Merit Pay proposal and basis for determining said cost. You stated that there is no cost attached to this proposal.

9. Further, the Union again requests for at least the third time from our initial request the following items:

a. Documents describing tuition or training reimbursements available to employees in the bargaining unit; You stated that no such documentation exists.

b. A complete copy of cost reports submitted, including supplemental submissions, for reimbursement for Medicaid and from any other public entity or funding source for the years 2002, 2003, 2004; You stated that you would provide this information no later than 9/16.

c. A copy of the current collective bargaining agreement. You stated that you would provide this by 9/20.

So despite your loud pronouncements to the contrary, we are not at impasse. The Union is prepared to offer a complete counter-proposal on all outstanding issues upon receipt of the above requested information.

For the Members of SEIU 1199NJ,
Larry Alcoff
Chief Negotiator
Cc: Milly Silva
Ellen Dichner, Esq.
Bargaining Committee

Alcoff sent another letter to Jasinski, dated September 16, 2005, with regard to Respondent Pinebrook, wherein he modified his prior request, and discussed the relevance of the information requested. This letter reads as follows:

> Re: Pinebrook
>
> Dear David:
>
> I want to modify the information request that I sent to you dated September 12, 2005; by (a) clarifying that all requests related to A-Best and other agency employees (#1, 2, And 3) are relevant because of the parties' respective proposals regarding the use of agency personnel and (b) reminding you that you were going to provide to the Union, by September 20th, a list of all part-time employees including names, title, date of hire, and average hours worked each week during the last 13 weeks.
>
> For the Member of SEIU 1199NJ,
> Larry Alcoff
> Chief Negotiator
> Cc: Milly Silva
> Ellen Dichner, Esq.
> Bargaining Committee

Subsequently, sometime in September 2005, the Union received some of the information requested by the Union. On October 10, 2005, Alcoff wrote to Jasinski with regard to all three facilities, indicating what items were still missing, and adding some additional requests for information.

> RE: Pinebrook (and other Gericare)
>
> Dear Mr. Jasinski:
>
> There are several items that you have not provided which were requested in my September 12, 2005 correspondence:
>
> 1. All items (1, 2, and 3) related to the use of Agency personnel. This is particularly relevant since both parties have made proposals related to the use of Agency personnel and the matter remains unresolved;
> 2. A copy of the current collective bargaining agreement.
> 3. Lastly, while you provided the list of new employees hired in the previous six (6) months, since it reflects that not a single bargaining unit employee was hired, I would ask for the following documents:
>
> (a) A list of all bargaining unit employees terminated from employment, either voluntarily or involuntarily, since January 1, 2005, including name, job title, date of hire, and reason for leaving.
>
> (b) A copy of all work schedules (whether done weekly, bi-weekly, or monthly) for each nursing unit, dietary, and housekeeping since April 1, 2005.
>
> Lastly, while it does not specifically relate to Pinebrook, you owe us several documents requested for Milford Manor and Monmouth Care as well. Please provide the requested information no later than Friday, October 14, 2005.
>
> For the members of SEIU 1199NJ,
>
> Larry Alcoff
> Chief Negotiator
> Cc: Milly Silva
> Ellen Dichner, Esq.
> Bargaining Committee

Prior to October 28, 2005, the Union had sent a letter requesting interest arbitration for all three facilities. In October 2005, Jasinski sent three identical letters to Alcoff, responding to that request, but making no reference to the Union's information requests.

> Dear Larry:
>
> Since this contract expired, the Union's leadership has not tried to reach a contract that balances the interests of the employees with the needs of the facility. Instead, from the first session, the Union exhibited no interest to negotiate in good faith and effectively refused to make any meaningful proposals. Indeed, the Union insisted that this Facility must agree to the terms negotiated by others. The Most Favored Nations Clause has consistently been thrown up at this employer effectively thwarting any meaningful negotiations. We have heard the all too familiar chant from the Union that your hands are tied and demanded that we agree to those negotiated terms agreed to by others. You and your chief negotiators have stated that you cannot deviate from what was negotiated with other employers. Such actions exhibit bad faith.
>
> The casualties in your bad faith negotiation are the employees and the facility. It seems the Union shows no concern for either party; rather, it chooses to rely on its selfish goals and myopic focus. This recent stunt by the Union is nothing more than an attempt to obfuscate the issues and relieve the Union leadership of its responsibility to the employees at this facility.
>
> As a chief negotiator, we would expect that you know there is no such device as interest arbitration in this contract. We simply have no idea what you are talking about. The contract must be resolved at the bargaining table which you have avoided to do at all costs. SEIU 1199 has only commenced negotiations *after* the contract was resolved with other employers. Since the last negotiation more than one month ago we submitted our final offer to you, to date, you have not responded. It is clear to us you have never shared any interest for the employees at this facility.
>
> We urge you to cease playing games with the employees and their futures and reach an amicable resolution that addresses the needs of this facility with that of the employees.

Alcoff responded to Jasinski by letter of November 2, 2005, referring to all three facilities, as follows:

RE: Pinebrook, *Monmouth and Milford*

Dear Mr. Jasinski:

I am writing in response to your identical letters dated October 28, 2005, regarding the contract negotiations at Pinebrook Care Center, Monmouth Care Center, and Milford Manor Nursing Home. Since your letters are identical in every respect, I am replying to all of them in a single correspondence.

While the tone and substance of your letters is offensive and disingenuous, I will try to respond to what appear to be your main points:

1. The Union has been more than willing to negotiate in a meaningful way. We have made proposals that are specific to each of the Gericare facilities and are willing to explore new proposals on open issues. These proposals, in fact, deviate from proposals made in other negotiations. You, on the other hand, have failed to respond to numerous information requests relevant to open issues. You have failed to agree to bargaining dates. And you have engaged in regressive bargaining, most notably on the question of Union Access and Activity. Further, you have refused to recognize that the Union represents LPN's and have been non-responsive to any proposals or information requests regarding them. You have effectively insisted on altering the scope of the bargaining unit.

2. Regarding the demand for interest arbitration, your claim that "we simply have no idea what you're talking about" is disingenuous and dishonest. As you are aware, the last fully integrated signed contracts for Pinebrook and Monmouth Care covered the years 1989–1993 and 1991–1995, respectively. Both of these agreements contained provisions for interest arbitration if the parties could not reach an agreement. There was no change in this language referenced in any of the Memoranda of Agreement for any of the successor agreements negotiated since 1991. In fact, the parties used interest arbitration pursuant to the language in the Duration Article to resolve outstanding issues on no less than four occasions. If you are not aware of this history, please consult your client and the files. The historical record is indisputable. While the language in the Milford Manor agreement requires the mutual consent of the parties, the Union and employer have found the wisdom to agree to use arbitration in 1989 and in 2001. I hope that we can be as wise in 2005.

3. Not only is interest arbitration a part of our bargaining history over the past sixteen years, it is also the smart and right thing to do. Interest arbitration will help put an end to the acrimony between the parties, provide for continuity of care for the residents without possibility of disruption, and is supported by the many stakeholders at these facilities, including residents, their loved ones, our members, and community and political leaders. I will close by again asking that you respond to all outstanding information requests at these three facilities, offer additional dates in November and December (if necessary), and not be an obstacle to moving forward with the interest arbitration process. If you have names that you would like to propose as arbitrators, please provide a list in order to expedite the process.

For the members of SEIU 1199NJ,

Larry Alcoff
Chief Negotiator
Cc: Milly Silva
Ellen Dichner, Esq.
Bargaining Committee

Prior to sending this letter, Alcoff had at least three conversations with "Concetta," Jasinski's secretary, about arranging dates for bargaining at the three facilities here, as well as two other facilities (Pavilion and Laurel Bay) represented by Jasinski. Alcoff gave "Concetta" several dates of availability, and asked her to have Jasinski call to schedule dates. Concetta would tell Alcoff that Jasinski was out of town. Jasinski did not return Alcoff's calls. At some point Concetta called Alcoff, and a meeting for November 3, 2005, was scheduled for Respondent Pinebrook. No dates were offered by Jasinski to meet at either Respondents Milford or Monmouth.

As related above, the parties met at Respondent Pinebrook on November 2, 2005, but Jasinski offered no dates, in 2005 or 2006, for either Respondent Monmouth or Respondent Milford.

By letter date December 28, 2005, Alcoff requested negotiation dates for all three facilities, as follows:

RE: Gericare (Milford Manor, Monmouth Care, and Pinebrook)

Dear Mr. Jasinski:

The Union offers the following dates for negotiations at the three Gericare facilities:

January 4th
January 18th -20th
The week of January 23rd

We will need to coordinate the scheduling of these dates around the other facilities that you represent for which the same dates are offered. Please reply as soon as possible. Thank you.

For the members of SEIU 1199NJ,

Larry Alcoff
Chief Negotiator
Cc: Milly Silva
Ellen Dichner, Esq.
Bargaining Committee

Jasinski failed to respond to Alcoff's December letter, requesting negotiation dates.

By letter dated January 19, 2006, Alcoff stated that he was following up on his December 28, 2005 letter requesting negotiation dates, and offered all dates between February 4 to March 2, 2006, for the three facilities, Jasinski did not respond to this letter.

On January 23, 2006, Jasinski sent a letter to Alcoff, requesting a copy of an arbitrator's award. That letter did not offer any dates for bargaining, nor did it indicate anything about his

availability or nonavailability for any of the dates offered by Alcoff.

Alcoff replied to Jasinski's letter on January 25, 2006, enclosing a copy of the arbitrator's award that Jasinski had requested. The letter also adds Alcoff hopes "that you will now respond to my various information requests with the same level of attention. I look forward to hearing from you regarding dates for bargaining."

Once again, Jasinski did not respond to Alcoff's requests to schedule dates for bargaining at any of the three facilities involved here.

On January 20, 2006, the Union, by Ellen Dichner its attorney, requested information from all three Respondent's in identical letters, concerning a grievance that the Union had filed concerning the alleged failure of the Respondents to place agency personnel in the unit and failure to apply terms of the contract to those employees.[39]

The information requests, which as stated, were identical for each facility, reads as follows:

> Re: Failure to place agency personnel in the bargaining unit and failure to apply terms of the collective bargaining agreement to those employees
> *Case No.: 05-86*
>
> Dear Sir or Madam:
>
> This firm represents SEIU/1199 New Jersey Health Care Union in the arbitration in the above-referenced matter. Accompanying this letter is an Appendix describing documents the Union demands be produced to the Union in connection with this arbitration. The Union requests that these documents be produced to me no later than February 15, 2006.
>
> This demand for inspection in made so that the Union will have an adequate opportunity to prosecute the grievance in arbitration and narrow the scope of issues to be arbitrated. Please be advised that the Union's rights to inspect documents before an arbitration hearing and to have the documents produced at the hearing are protected and enforceable under the National Labor Relations Act and that the Employer's failure to comply would be a violation of Section 8(a)(5) of the Act.
>
> Very truly yours,
> Ellen Dichner
>
> ED/mb
> cc: David Jasinski, Esq.
> Milly Silva
>
> *Appendix*
>
> 1. Documents, including but not limited to invoices, showing (1) the names of agencies used by Pinebrook Nursing Home ("the Employer") to supply temporary employees working in bargaining unit positions, (b) the amount paid by the Employer to agencies for temporary employees, including the hourly rate charged for each job classification, and (c) the hourly compensation paid to agency employees during the period January 1, 2003 through March 31, 2005, broken down by job classification.
> 2. For each agency worker working at the Employer's facility, documents showing (a) the name of the worker, (b) the worker's job classification, (c) the date the worker began to work at the Employer's facility (d) the date, if any, the worker ceased working at the facility, (e) the number of hours worked on a monthly basis during the period January 1, 2003 through March 31, 2005.
> 3. Documents, including but not limited to weekly or monthly schedules, showing the names, dates, shifts, nursing units and/or departments for bargaining unit and agency workers during the period January 1, 2004 through March 31, 2005.
> 4. A complete copy of cost reports submitted by the Employer, including any supplemental submissions, for reimbursement for Medicaid and from any other public entity or funding source for the years 2003, 2004 and 2005.
> 5. Documents showing the names, job titles and dates of hire for all agency workers hired by the Employer as permanent employees during the period January 1, 2003 through March 31, 2005.
> 6. Documents showing the total wages paid and total number of hours worked by Employees, in each bargaining unit title, on a quarterly basis for the period January 1, 2003 through March 31, 2005.
> 7. Documents showing the total wages paid and total number of hours worked by agency workers, in each bargaining unit title, on a quarterly basis for the period January 1, 2003 through March 31, 2005.

Dichner received no response from Respondents by February 13, 2006, as she had requested. She therefore followed up with another letter dated February 27, 2006, this time sent to Jasinski, referencing all three facilities, as set forth below:

> Re: Pinebrook Manor, Milford Manor and Monmouth Care Center
> *Arbitrations: Failure to place agency personnel in the bargaining unit*
>
> Dear Mr. Jasinski:
>
> On January 20, 2006, I sent your clients the enclosed document demands in connection with the arbitrations in the above-referenced matters. To date, none of the documents have been produced to me.
>
> I would like to avoid filing charges with the NLRB or seeking the intervention of the Arbitrator to obtain these documents. If your client is in the process of compiling the documents or you have any questions, please let me know. If I do not receive the documents by March 20, 2006, I will assume your clients are refusing to comply

[39] As noted above, the collective-bargaining agreement provides that once an agency employee is employed for 1 year, that employee must be made an employee of the unit.

with the information requests and I will proceed accordingly.

Very truly yours,
Ellen Dichner

ED/cn
Encl.
Cc: Milly Silva

On March 3, 2006, Jasinski responded by letter to Dichner, enclosing documents, which Jasinski asserts, complied with the Union's requests his letter is as follows:

Re: Pinebrook Manor, Milford Manor, and Monmouth Care Center
Arbitrations:

Dear Ms. Dichner:

I am in receipt of your letter dated February 27, 2006 with regards to the above matter. Enclosed please find response documents to your demand of January 20, 2006. If you have any questions or would like to discuss this matter further, I can be reached at (973) 824–9700.

Very truly yours,
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

DFJ/cr
Encl.
Cc: Eleanora Harris-Matthews (w/o enc.)

Dichner sent Jasinski a letter dated March 13, 2006, acknowledging receipt of certain documents from Jasinski, but asserting that the "vast majority of documents were not produced." Dichner specifically detailed which documents were still missing. The letter reads as follows:

Re: Pinebrook Manor, Milford Manor and Monmouth Care Center
Arbitrations: Failure to place agency personnel in the bargaining unit

Dear Mr. Jasinski:

I am in receipt of your letter of March 3, 2006 together with the accompanying documents. The documents produced are not fully responsive to the Union's January 20, 2006 request; in fact, the vast majority of documents requested were not produced.

Specifically, no documents were produced that are responsive to paragraphs 1, 2, 4, 5, or 7 of the January 20, 2006 request and the documents that were produced in response to paragraphs 3 and 6 are incomplete. Various schedules were provided in response to paragraph 3 but they are far from complete and do not reflect which employees were agency employees. Indeed, no information was provided at all concerning agency workers at any of the three facilities. The schedules for Pinebrook appeared to cover one job title although the job title is not indicated. No schedules were provided for February, March, September and November 2004 and some schedules were missing for August 2004, October 2004 and November 2005. Selected schedules were provided for dietary workers, environmental services, housekeeping workers and CNAs at Monmouth. However, the schedules are spotty.[40] Finally, Milford produced schedules only for December 21, 2003 through October 9, 2004; these schedules appear to cover "aides."

Regarding paragraph 6, the only documents you produced were redacted computer printouts designated for "PB," Milford and "Mon" that appear to reflect the annual hours worked in 2003 by certain employees. Their job titles, dates of hire, rates of pay and total wages paid were not provided nor were the hours (or wages) provided on a quarterly basis. Additionally, no information was provided for 2004 and 2005.

I would appreciate receiving all the documents requested in my January 20, 2006 letter my March 20, 2006 as previously requested.

Thank you for your immediate attention.

Very truly yours,
Ellen Dichner

ED/cn
Cc: Milly Silva

Jasinski responded by three identical letters one for each facility, on March 16, 2006, essentially disagreeing with Dichner's characterization of Respondents' responses, as follows:

Re: Milford Manor

Dear Ellen:

I am in receipt of your letter of March 13, 2006 which alleges that the documents we recently produced in the above matter are "not fully responsive" to the Union's information request of January 20, 2006. Once again, I disagree with your characterization of the documents. Based on my experiences, nothing that we produced would satisfy you in this matter.

Despite your objections, Milford Manor has provided the Union with all of the relevant documents in its possession. In addition to providing you with their own documents, the facility requested that the staffing agencies turnover responsive information in their possession pursuant to the Union's January 20, 2006 request for information. The documents you have referenced in your March 13, 2006 letter are redacted versions of all of the documents that we received from the staffing agencies in response to the Union's inquiries.

At this juncture, to error on the side of precaution, we have taken the liberty to redact certain information, such as social security numbers and home addresses to protect the privacy of the individuals employed by the various

[40] For example, no schedules were provided for the dietary department prior to November 21, 2004, nor were any provided for the period between February 1 and July 17, 2005. In environmental services, no schedules were provided prior to March 20, 2005. In housekeeping, 2004 schedules were provided for only about five weeks. No CNA schedules were provided for 2004 and schedules were missing for many months in 2005.

staffing agencies. I think that you would agree that such protections are necessary. Of equal importance, it is not in dispute that the redacted information is simply not relevant to the Instant proceedings. Therefore, until told otherwise, this information will not be disseminated.

If you have any inquiries, or would like to discuss this matter further, I can be reached at (973) 824–9700.

Very truly,
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

DFJ/PJD

Dichner replied on March 23, 2006, in a single letter, again referencing all three facilities, and detailing once again, what items still had not been provided by Respondents. This letter reads as follows:

Re: Pinebrook Manor, Milford Manor and Monmouth Care Center

Dear Mr. Jasinski:

This is response to your letter of March 16, 2006 regarding the Union's January 20, 2006 information requests to Pinebrook Manor, Milford Manor and Monmouth Care Center. I am frankly rather mystified by your response that Pinebrook, Milford and Monmouth have provided "all relevant documents" in their possession.

No items requested in paragraph 1 were provided. As invoices would be issued to your clients, they should have that information available. Staffing agency invoices typically show the names of the agency employees who worked during the billing period, hours worked and rate paid.

As I understand your letter, the redacted computer documents designated for "PB", Milford and "Mon" are documents you received from the staffing agency. These documents do not include job titles, date worked, rates of pay and total wages paid, as requested in paragraph 2 of the Union's January 20, 2005 information request. Nor do they show the number of hours worked on a monthly basis. No documents reflecting agency information–including the sparse, unredacted information provided for 2003–was provided for 2004 and 2005. No related documents, described in paragraph 7 of the information request, were provided.

Regarding the schedules requested in paragraph 3, I will not repeat the details in my March 13, 2006 letter except to say that it is surprising that your clients do not maintain schedules, especially in the nursing department, that are more recent. For example, Milford provided schedules for 2003 to October 2004 but nothing after that date.

Significantly, no information was provided in response to paragraphs 4, 5 and 6–information that your clients certainly have in their possession. Paragraphs 5 and 6 concern the most basic and presumptively relevant information regarding the names, hours of work, wages and dates of hire for bargaining unit employees of the employers.

Your letter indicates that no further information is forthcoming. If I am incorrect on that account, please let me know immediately.

Very truly yours,
Ellen Dichner

ED/cn
cc: Milly Silva

There was no further response from Jasinski, nor any of the Respondents, and no further information was provided to the Union or to Dichner.

From April through June of 2006, the Union was going through an internal union election, and Alcoff was bargaining with other facilities. Thus, the Union made no further requests to schedule bargaining dates, nor any further information requests.

On June 23, 2006, Alcoff sent a letter to Jasinski, pointing out the lack of bargaining sessions for the three facilities, requesting "available dates for bargaining," and requesting additional information. The letter is as follows:

Re: Gericare (Monmouth Care, Milford Manor, and Pinebrook)

Dear Mr. Jasinski:

We have not had a bargaining session in many months. We request available dates for bargaining at each of the above-captioned facilities. In order to prepare for negotiations at these facilities, the Union requests the following information:

- A current list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), part-time or full-time status, number of hours worked and paid since January 1, 2006, and amount of vacation days, sick days, personal days and/or holidays earned but unused.
- A copy of any and all correspondence to employees since September 1, 2005 regarding any terms or conditions of employment.
- Copies of any personnel policies or the employee handbook that were changed and/or provided to employees on or after September 1, 2005.
- A list of all A-Best and other Agency personnel working in each facility and the number of hours each employee has worked since September 1, 2005.
- A copy of any A-Best employee handbook, current wage rates paid to A-Best employees in each facility, any memoranda to A-Best from A-Best or Gericare or related entities regarding terms or conditions of employment. Copies of any correspondence between A-Best and Gericare or related entities regarding this request for information, including any responses from A-Best;

- Any and all summary reports or data used by the Employer in each facility to monitor compliance with the collective bargaining agreement restrictions on the use of Agency personnel. This information should be provided on a monthly basis beginning with September 2005 and the request is made on an ongoing basis;
- The aggregate cost to the employer of the health, dental, vision, and life insurance plans for bargaining unit employees January 1, 2006 through May 31, 2006.
- The gross bargaining unit payroll January 1, 2006 through May 31, 2006.
- A list of all bargaining unit employees who have terminated employment for any reason since on or after September 1, 2005 including the name of the employee, the job title, date of hire, reason given for termination of employment, final wage rate, shift, and last date of employment.

Please respond to all of our information requests no later than July 7, 2006. This request for information is in addition to all prior request for information and this letter serves as a renewal of all such earlier requests.

For the members of SEIU 1199NJ
Larry Alcoff
Chief Negotiator

Cc: Milly Silva
Ellen Dichner, Esq.
Bargaining Committee
New Jersey State Board of Mediation
Lisa Pollack

Jasinski did not reply to Alcoff's letter, and provided no further information or available dates, until he sent letters dated October 31 and November 1 and 2, 2006.

The October 31, 2006 letter, related to Respondent Pinebrook. It reads as follows:

RE: Pine Brook and SEIU 1199
Contract Negotiations

Dear Larry:

We write you as the Employer's designated representative and labor counsel for Pine Brook Care Center. At the last bargaining session, after a number of bargaining sessions with several different representatives of the Union, even with involvement of the State mediators, the Union again was unwilling to provide any counter-offer. From the outset of the negotiations, you and other Union representatives have set the stage that a number of items were not negotiable based on the Most Favored Nations Clause negotiated by other employers, or the Union considered the issue beyond discussion, *i.e.,* participation in the Union's benefit funds. For example, the Union has repeatedly taken the position that the Employer has no option and must join its Health Plan and make contributions of at least 22.33%. Accordingly, our last best offer represented a final offer that addressed the needs of this facility and its employees—a position the Employer consistently took throughout the contract.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Indeed, at the bargaining table, the Employer confirmed that the Union had all of the information it needed to proceed forward in the negotiations. Nonetheless, you did nothing more than ask for the same delay tactics and abuse of the process. That request–coupled with your unyielding bargaining position because of the Most-Favored Nations Clause negotiated with other employer–reflect your bad faith bargaining tactics.

Moreover, you have been previously made aware of the employee petition stating that they no longer want the Union representing them. In fact, they have expressed continued dissatisfaction that the Union is permitted to enter the premises. In fact, the last time a Union representative entered the premise, a major disruption occurred. It is clear that the employees do not want the Union representing them anymore. We will not violate any laws by negotiating a contract with a Union who does not represent the employees.

On November 1, 2006, Jasinski responded on behalf of Respondent Monmouth and on November 1 and 2, 2006, on behalf of Respondent Milford. These letters are set forth below:

RE: Monmouth Care Center and SEIU 1199
Contract Negotiations

Dear Larry:

As you are aware, we are labor counsel for Monmouth Care Center. At the last bargaining session for Milford Manor, you unilaterally decided to change the negotiations by bringing representatives from Monmouth to attend sessions at other facilities. Indeed, Union representative respected the separate interests of the parties and held negotiations at each facility. While we would not object to who the Union decides to bring to negotiation sessions, we never agreed to joint negotiations. Each facility and its employees has their own interests and concerns. We have attempted to address those differing interests at the bargaining table.

As it has on numerous prior occasions, the Union continues to take the position that a number of items are non-negotiable because its hands are tied based on the Most Favored Nations Clause negotiated by other employers. The Union has repeatedly taken the position that the Employer has no option and must join its Health Plan and make contributions of at least 22.33%. Accordingly, our last best offer represented a final offer that addressed the needs of this facility and its employees—a position the Employer consistently took throughout the contract.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Nonetheless, the Union did nothing more than ask for information which has already been provided. Your request for duplicative information further represents the Union's delay tactics and abuse of the process. That

request—coupled with your unyielding bargaining position because of the Most-Favored Nations Clause negotiated with other employers—reflect your bad faith bargaining tactics.

Notwithstanding that the parties are at impasse, and your continued bad faith bargaining tactics, we would be willing to schedule another negotiation session concerning Monmouth Care Center with the Union. At that session, please be prepared to provide us with a comprehensive counter-proposal to our last best offer.

Please advise in writing your response.

Sincerely
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

DFJ:at

RE: Milford Manor and SEIU 1199
Contract Negotiations

Dear Larry:

We write you as the Employer's designated representative and labor counsel for Milford Manor. At the last bargaining session, after a number of bargaining sessions with several different representatives of the Union, you were again unwilling to provide ay counter-offer. As it has on numerous prior occasions, you and the Union have frustrated the negotiation process by repeatedly stating that a number of items are off the table based on what the Union negotiated with other employers and the Most Favored Nations Clause barred any discussion of the proposals. To name one item, the Union has repeatedly stated that participations and contributions to the Union's Health Plan is non-negotiable and the Employer must make contributions of at least 22.33%. Despite the Union's efforts to stall and delay contract negotiations, we made a final offer that addressed the needs of this facility and its employees—a position the Employer consistently took throughout the contract.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. This was confirmed by other Union representatives. Nonetheless, you did nothing more than ask for the same information. Your request for duplicative information further represents the Union's delay tactics and abuse of the process. That request—coupled with your unyielding bargaining position because of the Most-Favored Nations Clause negotiated with other employers—reflect your bad faith bargaining tactics.

Notwithstanding that the parties are at impasse, and your continued bad faith bargaining tactics, we would be willing to schedule another negotiation session with the Union for Milford Manor. At that session, we will be prepared to receive a comprehensive counter-proposal to our last best offer.

Please advise in writing your response.

Sincerely,
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

DFJ:at

Alcoff responded by separate letters dated December 1, 2006, one for each facility. They read as follows:

RE: Pinebrook

Dear David:

I am in receipt of your October 31, 2006 letter concerning Pinebrook collective bargaining negotiations. Your letter is replete with misrepresentations concerning what has taken place in bargaining.

First, you state the parties are at impasse. We are and were not at impasse; we reviewed the open issues at our last session and, as noted above, the Union is prepared to present counters as soon as you provide all of the requested information. Further, you have never presented the Union with a written "last, best, and final offer." I don't think anyone knows what your current proposal in bargaining is, including your client.

Second, you accuse the Union of acting in bad faith by making requests for information. You have never provided information or responded to questions regarding the use of agency personnel. On June 23, 2006, we also requested an updated list of employees, wage rates, hours worked, benefit time, etc. because the last time we received information concerning bargaining unit employees was a year earlier. None of this information has been provided.

In off-the-record discussions with the mediators, we offered to modify every proposal on the table in order to get to an agreement. You sat there silent and refused to respond. The "most favored nations" clause in other contracts has become your oft-repeated excuse to cast blame and refuse to bargain in good faith.

Finally, the Union continues to be the exclusive bargaining representative of the employees. The discontent over the lack of progress in these negotiations, shared by the Union as well as employees, is a result of your continued unfair labor practices.

The Union welcomes the resumption of collective bargaining negotiations that we have been trying to schedule since last year. I am available to meet during the weeks of December 12th and 19th. I reiterate, however, that I need updated, current information requested in my June 23, 2006 letter. Please let me know what dates during the two-week period offered are acceptable or whether you have alternative dates to propose.

For the members of SEIU 1199NJ
Larry Alcoff
SEIU

Cc: Milly Silva
Hector Pena
Ellen Dichner

RE: Milford Manor

Dear David:

I am in receipt of your November 2, 2006 letter concerning Milford Manor collective bargaining negotiations. Your letter is replete with misrepresentations concerning what has taken place in bargaining.

First, you state the parties are at impasse. We are and were not at impasse. The Union is prepared to present counters as soon as you provide us with requested information. I dispute your claim that I stated a number of items were off the table because of the most favored nations clause. For all of your protestations about my conduct, I have only attended negotiations one time for about two hours over 15 months ago.

Second, you accuse the Union of acting in bad faith by making request for information. You have never provided information or responded to questions regarding the use of agency personnel. On June 23, 2006, we also requested an updated list of employees, wage rates, hours worked, benefit time, etc. because the last time we received information concerning bargaining unit employees was a year earlier. None of this information has been provided. Further your continued claims of the uniqueness of each facility are laid to waste by your continued insistence on the exact same proposals for each site.

The Union welcomes the resumption of collective bargaining negotiations that we have been trying to schedule since last year. I am available to meet during the weeks of December 12th and 19th. I reiterate, however, that I need updated, current information requested in my June 23, 2006 letter. Please let me know what dates during the two-week period offered are acceptable or whether you have alternative dates to propose.

For the members of SEIU 1199NJ,
Larry Alcoff
SEIU

Cc: Milly Silva
Hector Pena
Ellen Dichner

Re: Monmouth Care

Dear David:

I am in receipt of your November 1, 2006 letter concerning Monmouth Care collective bargaining negotiations. Your letter is replete with misrepresentations concerning what has taken place in bargaining.

First, you state the parties are at impasse. We are and were not at impasse; we reviewed the open issues at our last session. We, also had a long discussion about the inclusion of the LPN's in the bargaining unit, the use of agency personnel, among other matters. Further, you have never presented the Union with a "last, best, and final offer." I don't think anyone knows what your current proposal in bargaining is, including your client.

Second, you accuse the Union of acting in bad faith by making requests for information. You have never provided information or responded to questions regarding the use of agency personnel. On June 23, 2006, we also requested an updated list of employees, wage rates, hours worked, benefit time, etc. because the last time we received information concerning bargaining unit employees was a year earlier. None of this information has been provided. Further your continued claims of the uniqueness of each facility are laid to waste by your continued insistence on the exact same proposals for each site. If you would actually bargain instead of posture, then you would know that the "most favored nations" clause in other contracts is much more your issue than ours.

The Union welcomes the resumption of collective bargaining negotiations that we have been trying to schedule since last year. I am available to meet during the weeks of December 12th and 19th. I reiterate, however, that I need updated, current information requested in my June 23, 2006 letter. Please let me know what dates during the two-week period offered are acceptable or whether you have alternative dates to propose.

For the members of SIU 1199NJ
Larry Alcoff
SEIU

Cc: Milly Silva
Ellen Dichner
Hector Pena

Jasinski responded to Alcoff on behalf of Respondent Pinebrook, by letter of December 20, 2006. His response is as follows:

RE: *PineBrook Care Center and SEIU 1199 New Jersey Contract Negotiations*

Dear Larry:

Your latest letter is nothing more than a continuation of your pattern and practice to distort the truth with misstatement and outright lies. We ask that you cease such actions. At the last session, we presented the Union with a "final offer". It was rejected by the Union. You are the latest in a string of Union representatives who supposedly represented the employees by reportedly stating that you could not and would not deviate from the contract negotiated with the Tuchman Group. Your proposals merely confirmed you preconceived positions that you never intended to negotiate in good faith. Miss Odette Machado, who had first-hand knowledge of your intentions, confirmed that you were not negotiating in good faith and never intended on negotiating a contract that addressed the interest of PineBrook and its employees. The Union members are the real losers in your game-playing.

We are willing to give you another chance. If you are interested in negotiating in good faith, I suggest you review our proposal which included a substantial wage increase. With regard to your information request, we have provided you with the same information at the commencement of the negotiation. Your request is a common tactic which you use to delay the negotiation process. Again, resulting in our employees and your Union members suffering. We suggest that you stop the gameplaying. You may come to realize that the negotiation is not about you. Rather, it is about our employees. From the beginning, our goal was to negotiate a contract that represented the interests of this facility and its employees.

Nevertheless, we will, once again, provide your with the information you requested. In the meantime, we request a copy of the Union's Health Care Plan, including but not limited to a summary plan description and all financial records evidencing the financial viability of the Plan—we have grave concerns about the management of these Funds. We understand that there has been a unilateral change in the provider as well as the level of benefits, a change which is prohibited under the expired collective bargaining agreement. We suggest a meeting to discuss our proposal during the week of December 26, 2006 or the first week in January, 2007. Please advise of your availability.

Sincerely,
JASINSKI AND WILLIAMS, P.C.
DAVID F. JASINSKI

DFJ:CLC
cc: Ms. Elenora Harris-Matthews (*Via* regular mail)

Although the record is unclear on this point, it appears that Jasinski did write a letter to Alcoff with regard to Respondent Milford dated December 27, 2006, in which he agreed to meet with the Union for bargaining. The record does not contain a copy of this letter, but Alcoff's letter of January 10, 2007, refers to such a letter from Jasinski. Alcoff's letter is as follows:

RE: Milford Manor

Dear David:

I am in receipt of your letter dated December 27, 2006. I returned from vacation on January 8th and will be in Pennsylvania during the week of January 15th. We are available for negotiations during the week of January 22nd and January 29th. I have provided dates in response to letters from you for other Gericare facilities as well as Pavilion and Laurel Bay. Scheduling these dates will need to be coordinated among your multiple clients.

We received the information provided which is a partial response to our information request in my June 23, 2006 letter. I reiterate, however, that I need all of the updated, current information requested in that letter.

I am enclosing a copy of the Tuchman Master Agreement per your request, although it was already provided to you in response to an earlier request.

Please let me know what dates during the two-week period offered are acceptable or whether you have alternative dates to propose.

For the members of SEIU 1199NJ
Larry Alcoff
SEIU

Cc: Milly Silva
Hector Pena
Ellen Dichner

Once again it appears that Jasinski did reply with respect to Respondent Monmouth, in a letter of January 2, 2007, which the record does not contain. However, Alcoff in his letter to Jasinski dated January 9, 2007, refers to such a letter, wherein Jasinski apparently promised to supply information to the Union. Alcoff's letter is as follows:

Re: Monmouth Care

Dear David:

I am in receipt of your letter dated January 2, 2007. I appreciate that you plan to provide the information we requested and look forward to its arrival prior to any scheduled negotiations. We are available to meet for negotiations on January 23rd, 24th 30th and 31st. These dates will need to be coordinated with bargaining dates at your other clients' facilities. Please reply regarding your availability.

I want to again assure you that the Union seeks a fair settlement for our members at Monmouth Care. We have never conditioned any settlement of a contract on terms that needed to be identical with other collective bargaining agreements.

I, also, want to remind you that at Monmouth Care Center, the Union represents LPN's; however, the Employer has provided no information regarding LPN's nor have you made any proposals regarding their terms and conditions of employment.

For the members of SEIU 1199NJ,
Larry Alcoff
SEIU

Cc: Milly Silva
Ellen Dichner
Hector Pena

In early January 2007, Jasinski did send some information to the Union for all three facilities.[41] According to Alcoff, the information submitted by Respondents in 2007, was still incomplete, inasmuch as it did not cover the entire time period requested, and failed to contain invoices for agency workers performing LPN, housekeeping, or dietary work.[42] Respondent

[41] On January 3, 2007, information with respect to Respondent Milford was provided. On January 9, 2007, information for the other two facilities was provided.

[42] The documents provided for Respondent Pinebrook, included invoices for LPNs only, that worked during October and November 2006. For Respondent Milford, the information provided covered a limited period of 5 months in 2006 and 2 months in 2004, and there is no in-

never Responded to Alcoff's January 10, 2007 letter, requesting negotiation dates for Respondent Milford.

As related above, the parties did meet at Respondent Pinebrook on January 24, 2007. After that meeting, Alcoff by letter dated February 9, 2007, summarized the parties discussion, in that meeting concerning the union's information request, as follows:

> RE: Pinebrook
>
> Dear David:
>
> In negotiations on January 24th, we reminded you that you had not yet provided information requested in our letter dated June 23, 2006. The information requested in that letter is material and relevant for bargaining. The Union again requests that you provide all of the requested information. Furthermore, during the course of the bargaining session, you refused to respond to questions that we posed and instead repeated the mantra "put it in writing"; therefore the Union further requests the following additional information:
>
> - A current list of all employees performing bargaining unit work by job classification in seniority order, including name, *address,* social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), *part-time or full-time status; number of hours worked and paid since January 1, 2006, and amount of vacation days, sick days, personal days and/or holidays earned but unused. This is from the June 23rd information request. I have placed emphasis on the parts to which you have not yet responded. Further, you did not provide any information regarding LPN's.*
> - A copy of any and all correspondence to employees since September 1, 2005 regarding any terms or conditions of employment. *You stated that there has been no correspondence regarding terms and conditions of employment since 9/1/05. Please confirm that this is true.*
> - Copies of any personnel policies or the employee handbook that were changed and/or provided to employees on or after September 1, 2005. Copies of any personnel policies or the employee handbook that were changed and/or provided to employees on or after September 1, 2005. *This was not provided.*
> - A list of all A-Best and other Agency personnel working in each facility and the number of hours each employee has worked since September 1, 2005. *You did not provide any information regarding the Dietary Department and LPN's.*
> - A copy of any A-Best employee handbook, current wage rates paid to A-Best employees in each facility, any memoranda to A-Best from A-Best or Gericare or related entities regarding terms or conditions of employment. Copies of any correspondence between A-Best and Gericare or related entities regarding this request for information, including any responses from A-Best. *You did nor provide any of this information.*
> - Any and all summary reports or data used by the Employer in each facility to monitor compliance with the collective bargaining agreement restrictions on the use of Agency personnel. This information should be provided on a monthly basis beginning with September 2005 and the request is made on an ongoing basis. *(Please clarify if what you provided is the only documentation that the employer uses for this purpose or whether there are other reports available.*
> - The aggregate cost to the employer of the health, dental, vision, and life insurance plans for bargaining unit employees January 1, 2006 through May 31, 2006. *You did not provide this information; however, we are revising the time period as the 2006 calendar year and any and all subsequent monthly costs going forward.*
> - The gross bargaining unit payroll January 1, 2006 through May 31, 2006. *You did not provide this information: however, please revise the time period as the 2006 calendar year and each month thereafter going forward.*
> - A list of all bargaining unit employees who have terminated employment for any reason since on or after September 1, 2005 including the name of the employee, the job title, date of hire, reason given for termination of employment, final wage rate, shift, and last date of employment. *You did not provide any of this information.*
> - The procedure used for offering overtime in each department, including who is authorized to offer and approve overtime.
> - A list of all bargaining unit and agency employees by job classification offered overtime or extra shifts since September 1, 2006 in each month and whether the employee worked or refused the overtime or extra shift opportunity.
>
> Please provide this information no later than February 23, 2006.
>
> For the members of SEIU 100NJ
> Larry Alcoff
> SEIU
>
> Cc: Milly Silva, President
> Marvin Hamilton, Secretary-Treasurer
> Hector Pena
> Ellen Dichner

Jasinski never to responded to Alcoff's February 10, 2007 letter, and did not provide any additional information the Union, as requested in the letter. Jasinski provided vague and

formation regarding usage of LPNs or dietary employees. For Respondent Monmouth only 6 months of information was provided, and contained no information with regard to dietary or LPN employees.

uncertain testimony that he "believed" that most of the information requested by Alcoff, had been supplied by Respondent Pinebrook either orally at prior meetings, or in previous correspondences. Jasinski conceded however that he did not recall weather he had provided information with regard to LPNs or dietary employees.

As to the first bullet point in Alcoff's letter, requesting lists of unit employees and various other items of information, since January 1, 2006, Alcoff testified that the Union received no information concerning LPNs, and did not receive details listed, such as hours worked, part of full-time status, and the address of employees. Jasinski testified that he "believed" he supplied the Union with a current list of all unit employees. He added that he "believed" the other italicized information in the letter was also provided, "to the Union in various forms." He was not specific as what "various forms" had supplied this information. As to addresses of employees, Jasinski asserted that the Union had the addresses of employees, since they need addresses in order to deduct dues.

The second and third bullet points requested correspondences to employees since September 2005 concerning terms and conditions of employment, and any handbook or personnel policies changed since September 1, 2005. Jasinski told Alcoff during bargaining that Respondent Pinebrook has made no changes and had no correspondence with employees concerning terms and conditions of employment. Alcoff concedes that Jasinski made these statements during bargaining, but asserts that Jasinski's oral response did not seem plausible to him, so he asked for confirmation in writing. Alcoff contends that the Union received no such confirmation in writing, although Jasinski testified that he did so. However the record does not contain any such document.

The information requested concerning the use of A-Best personnel since September 1, 2005, was not complete, since it did not include information concerning LPN or dietary department employees. Jasinski does not despite Alcoff's testimony on this issue, and did not recall whether Respondent Pinebrook provided such information.

The fifth bullet point requests information concerning A-Best, Including copies of an A-Best Handbook, wage rates paid to A-Best employees memoranda to A-Best regarding conditions of employment of these employees, copies of any correspondence between A-Best and Gericare regarding the request for information including any responses from A-Best. Jasinski admitted that he did not turn over a copy of the A-Best Handbook, since Respondent Pinebrook did not have it. Jasinski added that he believed that the other information requested by the Union was provided. Alcoff denies that the Union received such information. Jasinski also admitted that Respondent Pinebrook did not give the Union information as to what the Agency was being paid, because it did not feel that there was any relevance to that information.

The information submitted by Respondent Pinebrook to the Union in January 2007, concerning the use of A-Best employees, contained invoices covering only the months of October and November 2006.[43]

Bullet point six requests reports or data used by Respondent to monitor compliance with the contract's restrictions on use of agency personnel Alcoff also asked to clarify if what was previously provided was the only documentation used by Respondent Pinebrook to monitor compliance. Jasinski informed Alcoff during bargaining when this request was first made, that there was no obligation on Respondent Pinebrook to monitor compliance, since that is the Union's job. Thus, Respondent Pinebrook, in effect stated that it had no such documents, other than the invoices from A-Best, which had been provided to the Union. Jasinski did not respond to Alcoff's letter, and thus did not "clarify," whether Respondent used any other documents to monitor compliance.

The seventh bullet point requests aggregate cost of various plans for unit employees, from January 1–March 31, 2006, and revising the request to cover 2006 and any monthly costs going forward. Jasinski contends that he responded to this request during bargaining, but he was not sure if he replied in writing. The response was that the Union already had this information from the Union's Funds, which require contributions as a percentage of payroll.

Jasinski made a similar response to the Union's request for gross bargaining unit payroll (bullet point eight), although Jasinski also asserts that he "thinks" that he provided this information, anyway, but added he told Alcoff that the Union could calculate that information from its Funds. Alcoff denies receiving this information.

Bullet point nine requests a list of unit employees terminated since 2005, as well as reasons therefore and other details. Jasinski claims that this information was provided at the January 2007 bargaining session. Alcoff denies that this information was ever received. Respondent did not introduce any documents, confirming Jasinski's testimony that this information was turned over to the Union in January 2007.

The tenth bullet point requests information on procedure used for overtime, including who is authorized to offer and approve overtime. Jasinski replied at the bargaining table, that the procedure for offering overtime is set forth in the contract, and there is no set procedure. Jasinski conceded that he never responded to the Union's request to state who is authorized to request or approve overtime.

The final bullet point asked for list of unit and agency employees offered overtime since September 1, 2005, and whether the employee worked or refused overtime. Jasinski claims that this information was provided in January 2007. Alcoff denies that such information was provided. The record reflects that the documents submitted by Respondent Pinebrook in January 2007, did reflect overtime hours worked by agency employees, but only for the months of October and November 2006. Further there was no response to the Union's request as to whether employees (agency or unit) refused overtime since September 1, 2006.

[43] As noted these invoices included the names of the A-Best employee, and hours worked, with the rates of pay redacted.

IX. ALLEGED UNILATERAL ELIMINATION OF 40-PERCENT CAP IN AGENCY USAGE

As I have detailed above, the contractual clause with regard to agency usage, was the subject of considerable discussion during the bargaining with all three Respondents. As is also set forth above, when the clause was negotiated in 2001, it was the "understanding" of both Jasinski and Harris that the 25-percent figure of agency usage was to be measured over a 1-year period. Furthermore, during the 2002 negotiations, when the cap was raised to 40 percent, Stacy Harris, a union representative at the time, agreed with the position of Respondents that the 40-percent cap is measured on a 1-year period.

Additionally, in 2004, the Union filed a grievance against Respondent Milford, claiming that it had violated the 40-percent cap. During the arbitration hearing, Respondent Milford took the position that the calculation of the 40 percent is computed on a yearly basis. The attorney for the Union at the time, did not dispute disagree or agree with this position, but merely stated that the contractual language is unclear in terms of whether it is calculated on a weekly, monthly, or yearly basis.[44]

Further, during the January 2007 bargaining session at Respondent Pinebrook, Alcoff during his questioning of Jasinski as to whether Respondent Pinebrook was in compliance with the 40-percent rule, asked how the 40-percent figure was calculated. Jasinski replied that "[y]ou have to look over a one year period." Alcoff did not dispute Jasinski's interpretation of the time period at that time.

However, in a position paper submitted by Alcoff to the Region, on March 20, 2007, which formed the basis for the Region's complaint allegation, the Union appears to take a different position. Alcoff made a statistical analysis based upon a limited amount of information that had been supplied to the Union by Respondent's Pinebrook and Respondent Monmouth.[45] The information for Respondent Monmouth covered the period from June 10 to November 22, 2006. Alcoff calculated that during this period, the average number of agency employees was 18.93 per week, working an average of 709.8 hours per week. He also asserted that Respondent Monmouth employed 17 bargaining unit employees. Thus, Alcoff concluded that "Agency personnel are 52.7% of the staff performing bargaining unit work."

With respect to Respondent Pinebrook, the information provided to the Union, covered a 7-week period from October 1 to November 25, 2006. These documents demonstrated that the average number of agency employees during this period was 33.29 per week, working an average of 1246.5 hours per week. There were 23 bargaining unit employees represented by the Union at Respondent Pinebrook. Thus, Alcoff concludes based on this analysis, that "Agency Personnel are 54.1% of the staff performing bargaining unit work."

Alcoff also notes that LPNs were not included in the information supplied by Respondent Pinebrook and Respondent Monmouth.[46] Therefore, the agency employees used percent figures, would be higher for both Respondents, if LPNs had been included.

The General Counsel subpoenaed at trial more extensive records form Respondents with respect to agency usage. Records and invoices were provided by Respondents for the period of August 2006 through September 2007. The General Counsel then compiled an "Agency Usage Summary Chart," from these documents, which demonstrate the number of unit employees employed on a monthly basis, the number of employees representing 40 percent of total unit employees, and the total number of A-Best agency workers, who worked 37.5 hours each week. This summary is set forth below:

[44] As noted above, this arbitration was never completed, because the Union never sent an auditor to review Respondent Milford's books, as ordered by the arbitrator.

[45] The vomplaint herein does not allege, nor does the Union contend, in this proceeding that Respondent Milford has violated the 40-percent cap. As noted above, the Union did make that claim in the arbitration filed in 2004.

[46] As related above, Respondents took the position during negotiations, that LPNs were not included in the units.

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Aug. 2006:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	8/6–8/12/06	8/13–8/19	8/20–8/26	8/27–9/2/06	
A-Best	19 FT BU	*Missing*	16 FT BU	19 FT BU*	
Sept. 2006	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	9/3–9/09/06	9/10–9/16/06	9/17–9/23/06	9/24–9/30/06	
A-Best	15 FT BU*	14 FT BU	18 FT BU	17 FT BU	
Oct. 2006:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	10/1–10/07/06	10/08–10/14/06	10/15=10/21/06	10/22–10/28/06	10/29–11/04/06

A-Best	16 FT BU	19 FT BU	17 FT BU	17 FT BU*	19 FT BU*
Nov. 2006:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	11/05–11/11/06	11/12–11/18/06	11/19–11/25/06	11/26–12/02/06	
A-Best	18 FT BU	15 FT BU	17 FT BU*	16 FT BU*	
Dec. 2006:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	12/03–12/09/06	12/10–12/16/06	12/17–12/23/06	12/24–12/30/06	
A-Best	14 FT BU	13 FT BU	16 FT BU	16 FT BU	
Jan. 2007:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	12/31–01/06/07	01/07–01/13/07	01/14–01/20/07	01/21–01/27/07	
A-Best	13 FT BU	16 FT BU	17 FT BU	16 FT BU	
Feb. 2007:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	01/28–02/03/07	02/04–02/10/07	02/11–02/17/07M	02/18–02/24/07	02/25–03/03/07
A-Best	12 FT BU*	13 FT BU*	13 FT BU	15 FT BU	11 FT BU

* *Dietary Data Missing or Incomplete.*
** *Housekeeping and LPN information missing or incomplete*
*** *Dietary, Housekeeping and LPN Information missing*
"*PP" Represents payroll period*
"FT BU" Represents A-Best Workers who have worked full-time (a minimum of 37.5 hours during a given PP) in a bargaining unit position.

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March, 2007:	22 EE(s) on Payroll	[x 40% = 8.8]			
PP:	03/04–03/10/07	03/11–03/17/07M	03/18–03/24/07	03/25–03/31/07	
A-Best	14 FT BU	11 FT BU LPN Info Incomp.	17 FT BU	15 FT BU	
April, 2007	37 EE(s) on Payroll	[x 40% = 14.8]			
PP:	04/01–04/07/07	04/08–04/14/07	04/15–04/21/07	04/22–04/28/07	
A-Best	13 FT BU	17 FT BU	15 FT BU	17 FT BU	
May, 2007:	35 EE(s) on Payroll	[x 40% = 14]			
PP:	04/29–05/05/07	05/06–05/12/07	05/13–05/19/07	05/20–05/26/07	05/27–06/02/07
A-Best	14 FT BU	14 FT BU	16 FT BU	16 FT BU	16 FT BU*
June, 2007:	39 EE(s) on Payroll	[x 40% = 15.6]			
PP:	06/03–06/09/07	06/10–06/16/07	06/17–06/23/07	06/24–06/30/07	
A-Best	20 FT BU	14	17 FT BU	14 FT BU	
July, 2007:	39 EE(s) on Payroll	[x 40% = 15.6]			
PP:	07/01–07/07/07	07/08–07/14/07	07/15–07/21/07	07/22–07/28/07	07/29–08/04/07
A-Best	15 FT BU	16 FT BU	18 FT BU	18 FT BU	18 FT BU
Aug., 2007:	37 EE(s) on Payroll	[x 40% = 14.8]			
PP:	08/05–08/11/07	08/12–08/18/07	08/19–08/25/07	08/26–09/01/07	

A-Best	17 FT BU	21 FT BU	13 FT BU	18 FT BU	
Sept.., 2007:	35 EE(s) on Payroll	[x 40% = 14]			
PP:	09/02–09/08/07	09/09–09/15/07	09/16–09/22/07	09/23–09/29/07	
A-Best	19 FT BU	20 FT BU	17 FT BU	20 FT BU	

** Dietary Data Missing or Incomplete.*
*** Housekeeping and LPN information missing or incomplete*
**** Dietary, Housekeeping and LPN Information missing*
"*PP" Represents payroll period*
"FT BU" Represents A-Best Workers who have worked full-time (a minimum of 37.5 hours during a given PP) in a bargaining unit position.

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Aug., 2006:	30 EE(s) on Payroll	[x 40% = 12]			
PP:	07/30–08/05/06	08/06–08/12/06	08/13–08/19/06	08/20–08/26/06	08/27–09/02/06
A-Best	21 FT BU*	21 FT BU	24 FT BU	23 FT BU*	1**
Sept.., 2006	34 EE(s) on Payroll	[x 40% = 13.6]			
PP:	9/03–9/09/06	9/10–9/16/06	9/17–9/23/06	9/24–9/30/06	
A-Best	26 FT BU*	25 FT BU	22 FT BU	24 FT BU	
Oct.., 2006:	35 EE(s) on Payroll	[x 40% = 14]			
PP:	10/1–10/07/06	10/08–10/14/06	10/15=10/21/06	10/22–10/28/06	
A-Best	25 FT BU *H*	23 FT BU**	22 FT BU	25 FT BU	
Nov., 2006:	34 EE(s) on Payroll	[x 40% = 13.6]			
PP:	11/05–11/11/06	11/12–11/18/06	11/19–11/25/06	11/26–12/02/06	
A-Best	20 FT BU *H*	18 FT BU**	14 FT BU**	16 FT BU**	
Dec., 2006:	32 EE(s) on Payroll	[x 40% = 12.8]			
PP:	12/03–12/09/06	12/10–12/16/06	12/17–12/23/06	12/24–12/30/06	
A-Best	14 FT BU**	15 FT BU**	20 FT BU	16 FT BU**	
Jan., 2007:	29 EE(s) on Payroll	[x 40% = 11.6]			
PP:	12/31/06–01/06/07	01/07–01/13/07	01/14–01/20/07	01/21–01/27/07	01/28–02/03/07
A-Best	20 FT BU	19 FT BU*	27 FT BU	22 FT BU	24 FT BU
Feb., 2007:	30 EE(s) on Payroll	[x 40% = 12]			
PP:	02/04–02/10/07	02/11–02/17/07	02/18–02/24/07	02/25–03/03/07	
A-Best	21 FT BU	21 FT BU	21 FT BU	22 FT BU	

** Dietary Data Missing or Incomplete.*
*** Housekeeping and LPN information missing or incomplete*
**** Dietary, Housekeeping and LPN Information missing*
"*PP" Represents payroll period*
"FT BU" Represents A-Best Workers who have worked full-time (a minimum of 37.5 hours during a given PP) in a bargaining unit position.

PINEBROOK NURSING HOME (22–CA–27291, ET AL)
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March, 2007:	31 EE(s) on Payroll	[x 40% = 12.4]			
PP:	03/04–03/10/07	03/11–03/17/07	03/18–03/24	03/25–03/31/07	
A-Best	17 FT BU	21 FT BU	21 FT BU	19 FT BU	
April, 2007	26 EE(s) on Payroll	[x 40% = 10.4]			
PP:	04/01–04/07/07	04/08–04/14/07	04/15–04/21/07	04/22–04/28/07	
A-Best	20 FT BU	20 FT BU	23 FT BU	19 FT BU*	
May, 2007:	25 EE(s) on Payroll	[x 40% = 10]			
PP:	04/29–05/05/07	05/06–05/12/07	05/13–05/19/07	05/20–05/26/07	05/27–06/02/07
A-Best	24 FT BU	23 FT BU	23 FT BU	24 FT BU	26 FT BU
June, 2007:	24 EE(s) on Payroll	[x 40% = 9.6]			
PP:	06/03–06/09/07	06/10–06/16/07	06/17–06/23/07	06/24–06/30/07	
A-Best	28 FT BU	25 FT BU	25 FT BU	19 FT BU	
July, 2007:	42 EE(s) on Payroll	[x 40% = 16.8]			
PP:	07/01–07/07/07	07/08–07/14/07	07/15–07/21/07	07/22–07/28/07	07/29–08/04/07
A-Best	25 FT BU	25 FT BU	23 FT BU LPN	24 FT BU LPN	28 FT BU
Aug., 2007:	40 EE(s) on Payroll	[x 40% = 16]			
PP:	08/05–08/11/07	08/12–08/18/07	08/19–08/25/07	08/26–09/01/07	
A-Best	23 FT BU	17 FT BU***	24 FT BU	27 FT BU	
Sept.., 2007:	38 EE(s) on Payroll	[x 40% = 15.2]			
PP:	09/02–09/08/07	09/09–09/15/07	09/16–09/22/07	09/23–09/29/07	
A-Best	25 FT BU	28 FT BU	26 FT BU	20 FT BU	

* *Dietary Data Missing or Incomplete.*
** *Housekeeping and LPN information missing or incomplete*
*** *Dietary, Housekeeping and LPN Information missing*
"*PP" Represents payroll period*
"FT BU" Represents A-Best Workers who have worked full-time (a minimum of 37.5 hours during a given PP) in a bargaining unit position.

Another issue raised during the course of this proceeding is the definition of "total staffing" in this contract's clause. Jasinski testified during the 2001 negotiations, when the clause was first negotiated, it was discussed and agreed between the parties, that the 25 percent would be calculated based on "total staffing," and that his "understanding" was that total staffing meant bargaining unit employees plus unit employees.

Alcoff's calculations, as well as the General Counsel's, defined total staffing as bargaining unit employees, and compared Agency employees directly with unit employees, in order to calculate the 40-percent figure.

The General Counsel relies on the Union's proposal submitted on August 19 to all three facilities, which states inter alia, *the "Employer may continue to utilize* Agency (emphasis added) a maximum of forty percent (40%) of the *bargaining unit's total employees"* (emphasis added).

The General Counsel also introduced into the record a letter from Jasinski to Julie Pearlman Schatz,[47] dated June 1, 2006. This letter referred to Respondent Milford, and dealt with a previous information request made by the Union, and alleged compliance with the Board's Order issued on December 13, 2005. This letter reads as follows:

Re: *SEIU 1199 and Milford Manor*

Dear Ms. Schatz:

As you are aware, the Union has requested certain information from Milford Manor in a letter, dated July 23, 2004. Our position throughout the NLRB process has been that Milford Manor has provided the Union with all of the requested information. We reiterate that much of the information related to the bargaining unit employees is

[47] Schatz was the attorney for the Union at the time.

already in the Union's possession, or can be easily obtained by the Union through its Welfare Fund.

Moreover, Arbitrator Gerard Restaino previously ordered Milford Manor to make its books and records available to the Union, so that the Union could inspect the records and conduct a thorough audit to gather the information it needed to ensure that the collective bargaining agreement (the "CBA") was not being violated. Milford Manor did not object to this order and agreed to comply in good faith with its terms. Curiously, since the date of the Arbitrator's order, the Union has not performed such an audit. In fact, the Union never even bothered to request an audit despite having been given unfettered access to the very Milford Manor records that it has so desperately sought throughout this dispute.

Nonetheless, in our continual good faith effort to comply with the Board's December 13, 2005 Order this letter and its attachments provide a full and complete response to the Union's July 23rd information request. A copy of the July 23, 2004 letter is annexed as Exhibit "A").

The July 23rd Letter

1. The total number of shifts worked in each job title (inclusive of Agency personnel) in each month from January 1, 2003 to the present; the total number of shifts worked in each job title in each month by Agency personnel from January 1, 2003.

Documents Responsive to this Request are annexed hereto as Exhibit "B".

2. The total number of hours paid in each job title (inclusive of Agency personnel) in each month from January 1, 2003 to the present; the total number of hours paid to Agency personnel in each job title in each month from January 1, 2003.

Documents responsive to this Request are annexed hereto as Exhibit "B".

3. For each instance in which the Agency personnel was utilized, please state the reasons why the company did not assign the work to bargaining unit personnel.

Recent New Jersey legislation precludes an employer from enacting mandatory overtime for nursing personnel. *See, N.J.S.A.* 34:11–56a31 *et seq.* In the instant matter, the bargaining unit employees refused to work the overtime, making the statutory staffing levels increasingly more difficult to satisfy. In that regard, Milford Manor was forced to rely on outside agency personnel in order to fill holes in its staff and remain in compliance with strict staffing demands imposed on it by the State of New Jersey and maintain its high levels of resident care.

Accordingly, on December 12, 2002, the parties executed a memorandum of Agreement ("MOA") which is included in the expired CBA. The MOA expressly grants Milford Manor the right to contract out, up to forty-percent (40%) ceiling set forth by the CBA.

4. The name of each Agency and/or subcontractor hired by the Company from January 1, 2003 to the present.

A-Best Management Co. and New Lanark Health Care, Inc. are the two agencies that have provided Milford Manor with professional staff in the bargaining unit positions from January, 2003 through July 2004.

5. *Copies of all correspondence between the Company and said contractors/agencies.*

Documents responsive to this Request are annexed hereto as Exhibit "C".

6. *The total number of wages paid in each job title (inclusive of Agency personnel) in each month from January 1, 2003 to the present; the total number of wages paid to Agency personnel in each job title in each month from January 1, 2003.*

Documents Responsive to this Request are annexed hereto as Exhibit "b".

Accordingly, Milford Manor has provided the Union with all documents in its possession in response to the Union's July 23rd request for information, and has fully complied with the Board's December 13, 2005 Order.[48]

The attachments to Jasinski's letter included some information covering periods in 2003 and 2004.

Foley who as noted above, conducted the negotiations for the Union, testified that the provisions in the clause involved are "ambiguous." More specifically he testified as follows:

> I'm sorry, I'm referring to GC-4. Some of my confusion stemmed out of the fact that it said, "shall increase percentage of agency employees to no more than 40 percent". And then if I, if I go back to GC-5, I notice that the original language says, "Employer retains the right to utilize agency personnel through a maximum of 25-percent of total staffing", so 25-percent of total staffing it, there is a reasonable, reasonable people could disagree around the interpretation of what that means.
>
> So, are we talking about actual employees? Are we talking about full-time equivalent? Are we talking about hours worked? How does overtime factor into that? How does that overtime offer factor into how, how overtime is offered to existing employees? There's it was unclear enough to me. I, I couldn't ever get a handle on it.

Further, Alcoff conceded in his testimony that the contract was not specific as how to interpret the use of agency personnel. Alcoff added that in his view, the clause means if the 40-percent cap is exceeded, the contract is violated for that week. However, Alcoff conceded that neither the contract, nor any other document reflects how often the 40-percent cap should be measured. He further admitted that in his position paper, he calculated the percentages on a weekly basis, because that is how the information from Respondents were provided to him. Thus he testified that if he had been given information for a 1-year period, he would have made the calculations based on that period of time.

[48] Milford Manor submits this response with a full reservation of its right to object to the scope *or* relevancy of the Union's requests and/or to supplement its responses as necessary in the future. Further, this response is made without prejudice to Milford Manor's position that the Third Circuit should deny the enforcement of the Board Order (3d Cir. Case 06-2817).

Additionally, when Harris sought documents from A-Best, in partial compliance with the Union's information request, she sent three identical letters to A-Best, referencing each Respondent, and reading as follows:

November 22, 2005
Re: Monmouth Care Center

Dear Chani:

Monmouth Care Center has a contract with A-Best to provide professional staff on a need basis. For several years, A-Best has provided professional staff to supplement the staffing needs under circumstances, and as requested, by the Facility's Administration.

The collective bargaining agreement between Monmouth Care Center and SEIU 1199 New Jersey expired on March 31, 2005. Under the expired contract, the parties agreed that up to forty (40%) percent of the workforce may be Agency personnel. Such 40% shall be cumulative based on the yearly schedule. We have fully complied with this clause. Nevertheless, the Union has requested the names of your professional staff who have performed services at Monmouth Care Center. We ask that you provide the names of the individuals who have worked at Monmouth Care Center over the previous three (3) years.

Your prompt attention to this matter is greatly appreciated.

Sincerely,
Eleanor Harris
Director of Human Resources

EH:rd

Respondents' brief included calculations made by its attorney, concerning Respondents Monmouth and Pinebrook, using the General Counsel's own summary, but based on Respondents' interpretation of the contract, i.e., calculating the percentage on a yearly basis, and defining total staffing as including both bargaining unit and agency employees. This summary is set forth below.

Agency Usage Summary

Monmouth Care Center *(September 24, 2006—September 29, 2007)*[49]

Average Number of Employees:[50]	29.5
Average Number of Agency Personnel:[51]	15.9
Average Total Staffing:[52]	45.4
Percentage of Agency vs. Total Staffing :[53]	**35.0%**

Pine Brook Care Center *(October 1, 2006—September 29, 2007)*

Average Number of Employees:	32.2
Average Number of Agency Personnel:	21.9
Average Total Staffing:	54.1
Percentage of Agency vs. Total Staffing:	**0.48%**[54]

X. ANALYSIS AND CONCLUSIONS

A The Alleged Refusal to Supply Information

The general principles regarding the obligation of an employer to submit information to a Union are clear and not in dispute. An employer, on request must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *Dodger Theatricals,* 347 NLRB 953, 967 (2006). The duty to provide information includes information relevant to contract administration and negotiation. *National Broadcasting Co.,* 352 NLRB 90, 97 (2008); *Pulaski Construction Co.,* 345 NLRB 931, 935 (2005).

Where the requested information concerns terms and condition of employment of employees within the bargaining unit, the information is presumptively relevant, and the employer has the burden of proving lack of relevance. *AK Steel Co.,* 324 NLRB 173, 183 (1997); *Samaritan Medical Center,* 319 NLRB 392, 297 (1995). Where the information sought concerns employees outside the bargaining unit, the union must show that information is relevant to its representative functions. *Dodger Theatricals,* supra at 14; *Bryant Stratton Business Institute,* 321 NLRB 1007, 1013 (1996). Although the union has the burden of showing the relevance of nonunit information, that burden is not exceptionally heavy, requiring only a showing of probability that the desired information is relevant, and that it would be use to the union in carrying out its duties and responsibilities. *Certco Distribution Center,* 346 NLRB 1214, 1215 (2006); *Bryant Stratton,* supra.

Further, an employer must respond to the information request in a timely manner. *Woodland Clinic,* 335 NLRB 735, 736 (2006); *Samaritan Medical Center,* supra at 398; *Leland Stanford University,* 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Woodland Clinic,* supra; *Valley Inventory Service,* 295 NLRB 1163, 1166 (1989).

In applying these principles to the instant case, I first consider the information request filed by Union Attorney Dichner on January 20, 2006. This information was related to a grievance that the Union had filed against all three Respondents,

[49] The agency information for the week of October 29 was not provided in GC Exh. 54.

[50] The average number of employees was calculated by dividing the number of total employees on the payroll on a monthly basis from October 2006 through September 2007 and dividing by 12.

[51] The average number of agency personnel was derived from adding the total number of agency employees on a weekly basis for a 52-week period and dividing by 52.

[52] "Total Staffing" is the term used by the parties in the 2001 MOA. Jasinski's unrebutted testimony was that "total Staffing" means the total personnel necessary to staff the facility. Thus, we calculated the average number of total staffing by adding the average number of employees and the average number of agency personnel.

[53] The percentage of agency was calculated by dividing the average total staffing by the average number of agency personnel.

[54] The 2001 MOA is silent if the agency cap exceeds 40 percent by a fraction of a percentage point. Of course, it is a reasonable interpretation that 40.48 percent should be rounded down to 40 percent and Pine Brook did not exceed the 40-percent cap.

asserting that the three facilities had failed to place agency personnel in the bargaining unit and failed to apply the terms of the collective-bargaining agreement to those employees.[55]

In assessing the seven items requested by Dichner, there can be little question that they are relevant to the Union's grievance.[56]

All of the documents requested, are directly related and can reasonably be construed as potentially being of use to the Union, in ascertaining whether the Union's reasonable belief that Respondents had been using agency employees in excess of 1 year was correct, and, therefore, Respondents had possibly violated the contract. *National Broadcasting Co.,* 352 NLRB at 99. In that regard, the Union had anecdotal evidence from unit employees, that Respondents had used significant numbers of agency employees, and that when individuals were seeking employment with Respondents, they were told that would be hired by the agency. Thus, I find that the Union had a reasonable belief, for requesting the information. *Shoppers Food Warehouse,* 315 NLRB 258, 259 (1994), I emphasize in this regard that I need not and do not decide whether in fact Respondents have violated the contract. Rather, I conclude only that the Union has established a reasonable belief that the contract may have been violated, and that the information sought may be of use to the Union in ascertaining whether the contract has been breached. The issue of whether Respondents have violated the contract is for the arbitration to decide. *National Broadcasting Co.,* supra; *Shoppers Warehouse,* supra.

Turning to Respondent's compliance with the Union's request, I note initially that in the Union's request, dated January 20, 2006, the Union asked that the documents be produced by February 15, 2006.[57] However, Respondents ignored this letter, as well as the Union's self-imposed deadline, and did not respond to Dichner's letter. This necessitated Dichner's followup letter to Jasinski, dated February 27, 2006, wherein she reminded Jasinski of her January 20, 2006 requests to the Respondents, and stated that none of the documents were produced. She added that she wished to avoid filing charges with the NLRB or seeking the intervention of the arbitrator, and again demanded that the information be provided.

On March 3, 2006, Jasinski provided some information to Dichner. In this regard, the Union was entitled to the information at the time it made its initial request, and it was Respondents' obligation to furnish it as promptly as possible. *Woodland Clinic,* supra at 737; *Pennco, Inc.,* 212 NLRB 677, 678 (1974). The duty to furnish information requires a reasonable good-faith effort to respond to the request as soon as circumstances allow. *Woodland Clinic,* supra; *Good Life Beverage Co.,* 312 NLRB 1060, 1062 fn. 9 (1993). Here, the Respondents' furnished no explanation or excuse for ignoring the Union's January 20, 2006 request for information, and for not initially complying with the request, until March 3, 2006, and only after the Union renewed its request on February 27, 2006, accompanied by a threat to file NLRB charges, if the information was not provided. In such circumstances I conclude that Respondents have not made a good-faith effort to respond as promptly as circumstances allow, and have violated Section 8(a)(1) and (5) of the Act by failing to respond in a timely manner. *Woodland Clinic,* supra (delay of 7 weeks unreasonable, absent explanation); *Bundy Corp.,* 292 NLRB 671, 672 (1989) (delay of 2-1/2 months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products,* 267 NLRB 593, 598 (1983) (employer replied within 2 weeks, supplying some information, but did not supply rest of information required until 6 weeks later. No explanation given for "foot dragging" on request); *Pennco,* supra, 212 NLRB at 678 (union made two requests on May 13 and 23. Information not supplied until June 29, a few days after the union filed amended charge with Region. Board concludes that delay was unreasonable and violative of 8(a)(5) of the Act). *Local 12 Engineers,* 237 NLRB 1556, 1558–1559 (1978) (information supplied 6 weeks after request, and only after charge filed with the Board); *International Credit Service,* 240 NLRB 715, 718 (1979) (unexplained delay of 6 weeks unreasonable).

Turning to the adequacy of Jasinski's responses to the Union's requests, I agree with the General Counsel that the evidence establishes that Respondents did not fully comply with the Union's requests. Upon receipt of the documents, Dichner wrote to Jasinski explaining in detail why the documents produced were not fully responsive to the Union's requests, explaining precisely what documents were missing. She requested that the items not provided be sent to the Union.

Jasinski replied on March 16, 2006, disagreeing with Dichner's characterization that Respondents were not "fully responsive," and asserting, "based on my experiences, nothing that we produced would satisfy you in this manner." Jasinski then proceeded to assert that Respondents had provided the Union with "all the relevant documents in its possession." He then explained how Respondents' had requested some information from the agencies, and explained why they had redacted certain items, such as social security numbers and home addresses.

Dichner responded by letter of March 23, 2006, again detailing missing items, and questioning how Jasinski could possibly assert that the Union had received "all relevant documents in Respondent's possession." She detailed again what items were still missing, including invoices showing the names of agencies used, amounts paid by the Respondents for these services, compensation paid and hours worked by agency employees, schedules for agency employees and unit employees, information regarding the names, dates of hire and job titles of agency employees hired by Respondents as permanent employees, and documents showing wages, and hours of unit employees. Further Dichner explained that the information that was provided from the agencies were incomplete and did not cover the period requested.

Jasinski never responded to Dichner's letter, and never disputed or explained why her assertions that Respondents must have the missing information, was no accurate. Further, Re-

[55] I note that the contract provides that if an agency employee works for the Employer for a year, the individual must be placed in the unit and be covered by the contract.

[56] Indeed Respondent has not questioned the relevance of any of the items requested, either in its brief, or in Jasinski's responses to Dichner's requests.

[57] I note that Jasinski was cc'd with the Union's initial information request.

spondents never supplied the information to the Union, as detailed in Dichner's letters.

Further, Jasinski testified extensively in this proceeding, but provided no testimony with regard to this information request. He furnished no explanation why he did not respond to Dichner's last letter, nor why Respondents did not supply the information that Dichner asserted was missing. Nor did Jasinski furnish any testimony disputing Dichner's assertion that Respondents did not supply most of the information, nor her statement that Respondents must have the documents requested by the Union.

My review of the missing items detailed by Dichner, as set forth above, leads me to conclude, which I do, that Jasinski's assertion in his letter, that Respondents had provided the Union with "all the relevant documents in its possession," was clearly inaccurate. I also rely upon in making this conclusion, Jasinski's failure during his testimony to repeat this assertion under oath, or to perhaps explain or clarify why he believed Respondents had supplied "all the relevant documents" that Respondents had to the Union.

Accordingly, based on the foregoing, I conclude that all three Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply relevant information to the Union, as detailed in Dichner's letters.[58]

The record reflects that the Union made numerous information requests of the Respondents since bargaining began in January 2005. Respondents supplied some of the information requested, but not all. Thus, once Foley took over the position as lead negotiator for the Union in May 2005, he made requests both orally or in writing for the information not supplied. The missing information related to the Respondents' issue of agency personnel. Although Jasinski promised to supply this missing information to the Union, neither he nor the Respondents had done so, by the time Alcoff replaced Foley as lead negotiator for the Union in July 2005.[59]

At the August 14, 2005 meeting involving Respondent Milford, Alcoff reminded Jasinski that the Union still had outstanding information requests that had not been complied with, concerning agency personnel. After that meeting, Alcoff sent three identical letters to Jasinski, one for each facility, requesting information, "in order to draft our counterproposal." The information requested related to the issue of agency personnel use, plus information concerning merit pay, tuition reimbursement, and cost reports submitted to Medicaid for reimbursement.

Jasinski responded to Alcoff by letters with respect to Respondents Monmouth and Pinebrook on September 8 and 9, respectively. The responses were essentially identical. The Union had asked for the same information ordered by the Board to be turned over by Respondent Milford in Case 22–CA–26745 regarding the use of agency personnel.[60] Jasinski responded with respect to this request, that neither Respondent Monmouth nor Respondent Pinebrook were parties to the NLRB case. This in Jasinski's view, "requesting such information is irrelevant and has absolutely no relevance to the issues for these negotiations." With respect to items 2–5 of the request, dealing with agency use documents, Jasinski responded that since there had been no assertion by the Union or grievance filed by the Union, that Respondents have failed to comply with the contract's 40-percent cap, "this request after months of contract negotiations is irrelevant to the contract negotiations and intended to stall and delay negotiations." Jasinski responded to items 5–8(a) by stating that no such documents exists. With respect to the Union's request for cost reports submitted to Medicaid, Jasinski asserted that this information is "available to the Union via the staff." Jasinski added that the total cost of payroll had been provided to the Union's committee, but would be provided again.[61]

On September 12, 2005, the parties met at Respondent Pinebrook. The parties discussed the information request and Jasinski's responses. Jasinski took the same position at the meeting as he did in his letter, with regard to the request for information ordered by the Board to be turned over by Respondent Milford. That is that the information is irrelevant and will not be provided. Alcoff replied that the information is relevant, since it deals with the agency usage, a key issue in the negotiations, and the Union is entitled to it. As to the specific information requested concerning lists of agency employees, job title, hours worked, dates of hire, and wage rate, Jasinski asserted as he had in his letter that the information is irrelevant. He added that if the Union was interested in obtaining this information, it could subpoena it from the agency. Jasinski asserted that Respondent Pinebrook had no knowledge of the existence of "any memoranda or employee handbook outlining the policies of A-Best." Alcoff replied that the Union is entitled to it and "you can request it of the Agency." Jasinski modified the position taken in his letter of September 9, 2005, and stated that he would provide the Union by September 20 list of employees hired in the past 6 months, including name, job title, and rate of pay. Jasinski also agreed to produce a copy of the cost report submitted to Medicaid by September 16. Jasinski reiterated the responses made in his letter, that documents requested relating to merit pay" did not exist." Alcoff then sent a letter to Jasinski, dated September 12, 2005, summarizing their discussion concerning the information requests, as I have outline above.

On September 16, 2005, Alcoff sent another letter to Jasinski, with regard to Respondent Pinebrook, explaining why the information concerning A-Best employees was relevant, and reminding Jasinski of his promise to submit to the Union by

[58] I note that Jasinski in his March 16, 2006 letter to Dichner stated that in the agency information supplied to the Union, the Respondents redacted the social security numbers and addresses of agency employees to protect their privacy. Dichner did not object to this redaction, and in fact had not specifically asked for these items. I, therefore, find that the Respondents was not obliged to supply that information to the Union.

[59] The complaint does not allege that Respondents violated the Act by any conduct between January and July 2005, with respect to information requests of the Union.

[60] As noted above, the Board had ordered Respondent Milford to turn over to the Union, certain information concerning the use of agency personnel by Respondent Milford. At the time of Alcoff's request, this information still had not been supplied to the Union.

[61] The record does not reflect any response by Jasinski nor by Respondent Milford, to the Union's August 30 request for information for that facility.

September 28, 2005, lists of employees including hours worked, title, and date of hire for the last 13 weeks.

On September 16, 2005, Jasinski sent the information to Alcoff that he had promised, i.e., list of new hires, list of overtime, and a Medicaid cost report.

Alcoff replied on October 10, 2005, repeating his requests for items still not produced by Respondent Pinebrook.[62] Alcoff then added to prior requests, by noting that the list of new employees hired over the last 6 months, included no bargaining unit employees hired. Therefore, Alcoff asked for list of unit employees terminated, voluntarily or involuntarily, since January 2005 and a copy of work schedules. Further, Alcoff repeated that Respondents Milford and Monmouth owes the Union several documents requested.

Jasinski did not reply to this letter, nor did Respondents comply with Alcoff's requests for outstanding information at that time. Jasinski did send letters to Alcoff regarding each facility, dated October 28, 2005, in response to the Union's request for interest arbitration. In these letters, Jasinski accused the Union of bad-faith bargaining, and refused the Union's request for interest arbitration. None of the letters made any reference to the Union's outstanding information requests.

Alcoff responded in a single letter dated November 2, 2005, concerning all three Respondents. In this letter, Alcoff explained why he felt interest arbitration was appropriate, disputed Jasinski's assertion that the Union bargained in bad faith, and reminded Jasinski that he had failed to respond to numerous information requests relevant to open issues. Alcoff asked again that Respondents respond "to all outstanding information requests."

Jasinski did not respond to this letter from Alcoff, and no further information was provided at the time. The parties met on November 2, 2005, in the presence of mediators with regard to Respondent Pinebrook. Alcoff asserted that the Union had still nor received information from Respondent Pinebrook that had been requested, including information concerning the use of agency personnel, turnover, and a copy of the current collective-bargaining agreement. Jasinski responded that Alcoff's requests were a "delay and stall tactic and were not sincere, and there was no reason that the Union needed the information."

On January 25, 2006, Alcoff sent a letter to Jasinski, enclosing a copy of an arbitration award that Jasinski had requested and added that he (Alcoff) hopes "that you will now respond to my various information requests with the same level of attention." This request was ignored by Jasinski and Respondents, and no additional information was provided at that time.

The Union filed its initial charges on February 23, 2006, alleging that Respondents refused to meet and negotiate. On May 8, 2006, it filed additional charges alleging that Respondents since August 20, 2005, failed and refused to provide relevant information to the Union.

On June 23, 2006 Alcoff sent a letter to Jasinski pointing out the lack of bargaining sessions for the three facilities, requesting "available dates for bargaining," and requesting additional information.

Some of the information requested consisted of updating information previously requested and received, such as current list of employees performing unit work, including job title, wage rate, and other items; lists of agency personnel and hours worked since September 1, 2005.

It also included some items previously requested, but not provided, such as copies of the A-Best handbook, summary reports used by the Employer to monitor compliance with contractual restrictions on use of agency personnel, costs to Respondents of various benefit plans, gross bargaining payroll, and lists of employees terminated. Jasinski did not reply to this letter, and did not turn over any additional information at that time.

On July 26, 2006, the Region issues its initial complaint against Respondents, alleging that all three Respondents had refused to meet with the Union, and refused to supply relevant information to the Union since August 30, 2005.

This complaint produced no responses by Jasinski nor Respondents. No additional information was provided or any responses received from Respondents, until Jasinski sent letters to the Union dated October 31, 2006.

In the letter referring to Respondent Pinebrook, Jasinski once again accused the Union of bad faith during bargaining. He added that Respondent Pinebrook had provided the Union with "all of the documents" responsive to its request. He further accused the Union of asking for information, as a "delay tactic and abuse of the process." He concluded this letter by referring to the fact that "employees do not want the Union representing them anymore. We will not violate any laws by negotiating a contract with a Union who does not represent the employees."

In his letters to Alcoff, regarding Respondents Monmouth and Milford, Jasinski, also accused the Union of bad faith in bargaining as well as in making what Jasinski termed "duplicative information" requests, of information that he asserts was previously provided to the Union.

Alcoff responded by letters of December 1, 2006. He disputed Jasinski's assertion that all previous information requests by the Union had been complied with by Respondents. Alcoff noted that Respondents had not provided information regarding the use of agency personnel, and had not responded to the Union's June 23, 2006 request for an updated list of employees, wage rates, hours, etc., because the last time the Union received such information was a year earlier.

Jasinski responded by letter of December 20, 2006, with respect to Respondent Pinebrook. He continued to accuse the Union of bad-faith bargaining, but backed off from his previous position of refusing to meet with the Union any longer, because of employee dissatisfaction, and stated that Respondent Pinebrook was "willing to give you another chance." Jasinski once more accused the Union of using the information requests as a "common tactic" to delay the negotiation process. Nevertheless, Jasinski promised to provide the Union with the information that it requested.

[62] These items included the same information requested by the Union in the prior Board case against Respondent Milford, lists of all A-Best employees, including title, hours, date of hire, wage rate, and benefits provided, and any memoranda, or employee handbook outlining the policies of A-Best.

Jasinski also sent letters with regard to Respondents Monmouth and Respondent Milford, wherein he promised to supply information to the Union, as requested.

In early January 2007, all three Respondents provided some information to the Union. However, the information was not complete, since it did not cover the entire time period requested, nor information with respect to LPNs, and contained no invoices for agency workers performing LPN, housekeeping, or dietary work.

Alcoff wrote to Jasinski on January 9 and 10, 2007, with respect to Respondents Monmouth and Milford, respectively. With respect to Respondent Monmouth, Alcoff reminded Jasinski that the Union represents LPNs and stated that it "has provided no information regarding LPNs." In his letter regarding Respondent Milford, Alcoff stated that the information received by the Union was a partial response to its June 23, 2006 information request, and reiterated that he needed "all of the updated current information requested in that letter."

Jasinski did not respond to these letters, and has not supplied any of the missing information requested by the Union in its previous letters, with regard to Respondents Milford or Monmouth.

The parties met on January 24, 2007, at Pinebrook. Alcoff brought up the information request that he had made in his June 23, 2006 letter. They went over each item, and Jasinski would state that the items had been supplied, did not exist or demanded that the Union put their request in writing, if the item was missing. Alcoff mentioned that no information had been received with respect to LPNs. Jasinski replied that the Union did not represent LPNs, and demanded that Alcoff "prove it." Alcoff read the contract, which in the recognition clause mentioned all employees, with no exclusion of LPNs. Jasinski countered that the clause did not say that LPNs are included. Alcoff then mentioned that LPNs were in the body of the contract, and an employee pulled out an old contract, that mentioned LPNs in the wage article and another section.

Alcoff sent a letter to Jasinski dated February 9, 2007, summarizing the discussions at the January 24, 2007 meeting, concerning the Union's information request. I credit Alcoff's letter and testimony over Jasinski's vague and unsubstantiated testimony that most of this information had previously been provided the Union.[63]

I, therefore, find that Respondents did not submit to the Union addresses of current unit employees,[64] full or part time, number of hours worked and paid since January 1, 2006, amount of vacation days, sick days, personal days, and or holidays earned but unused, and any information regarding LPNs. It also did not provide information regarding A-Best employees who worked in the dietary department or LPNs. Further, the information supplied with respect to the use of A-Best employees in general was incomplete, since it covered only the months of October and November 2006, while the Union had asked for all employees employed since September 1, 2005. Further, Respondent Pinebrook redacted the wage rates paid to A-Best employees. Respondent Pinebrook also did not provide information as which A-Best employee or unit employees refused overtime, and submitted information concerning overtime worked by A-Best employees, only for the same 2-month period. Respondent Pinebrook did not furnish the Union with the A-Best handbook, or any memoranda to A-Best or from A-Best regarding terms and or of employment of agency employees, or copies of correspondence between A-Best and Respondent Pinebrook, regarding the information request, including any response from A-Best. With respect to costs of the benefit plans and gross unit payroll, this information was not provided. Alcoff revised the time period for this information from January 1 through May 31, 2006, to the calendar year 2006 and each month going forward.

Jasinski had responded orally to the Union's request for correspondences to employees since September 1, 2005, regarding terms and conditions of employment, or changes in personnel policies that no such documents and changes were made. Alcoff in his June letter asked Jasinski to confirm this is true. Jasinski did not do so.

Alcoff had asked for reports used by Respondent Pinebrook to monitor compliance with the contract's restriction on use of agency personnel. Jasinski when this request was previously made during bargaining, told Alcoff that it was the Union's job to monitor compliance, and that Respondent Pinebrook had no such documents other than the invoices from A-Best, which had been provided. Alcoff in his June letter, asked Jasinski to clarify if what Respondent Pinebrook provided us the only documentation used by Respondent Pinebrook or whether there are other reports available. Jasinski did not respond to this request, and did not "clarify" his prior statement, as Alcoff had asked in his June 23, 2006 letter.

Jasinski also did not respond to Alcoff's request inquiry of who is authorized to request or approve overtime in each department. Jasinski had replied orally during bargaining that there is no set procedure used for overtime.

Jasinski did not respond to Alcoff's letter of February 10, 2007, and did not supply the information requested. Further, neither Respondent Monmouth nor Respondent Milford supplied any additional information to the Union.

The first issue to be decided with respect to the information requests submitted by the Union during bargaining, is whether the information asked for is relevant to the Union's representational functions. There can be no doubt that these requests meet the broad definition of relevance, utilized by the Board, that such information has some bearing on the issues between the parties, *Bryan & Stratton,* supra, 321 NLRB at 1016, or that it would be "of use" to the union in carrying out its statutory responsibilities. *Wisconsin Bell,* 346 NLRB 62, 64–65 (2005).

Some of the information requested, relate to the terms and conditions of employment of Respondents' employees, and are

[63] Jasinski could not recall whether he supplied any information with regard to LPNs, or dietary employees, and admitted that he did not turn over a copy of the A-Best handbook, since Respondent Pinebrook did not have it, and that Respondent Pinebrook redacted information as to what the agency was paid, because he did not feel there was any relevance to the information. Jasinski took the position that the Union could calculate the information requested concerning cost of the benefit funds and gross payroll, from the Union's Funds.

[64] With respect to addresses of unit employees, Jasinski told the Union that they had the addresses of employees, since they need addresses in order to deduct dues.

presumptively relevant. Respondents in fact do not dispute the relevance of these items, and I need not discuss them further.

However, some of the information requested relate to the terms and conditions of employment of employees of A-Best, as well as other agencies, who performed work for Respondents. The Union is required to demonstrate the relevance of this information, which I believe that it has done. The issue of Respondents' use of agency personnel was as admitted by the Respondents, probably the most significant issue in the bargaining. The Union was seeking to modify the 40-percent cap on the use of agency employees and Respondents were insistent on retaining that provision, without change. That issue was the chief stumbling block in preventing the parties from reaching agreement, and was the issue that was discussed more frequently and more extensively that any other item during the bargaining.

During these discussions, in addition to the Union questioning the need for Respondents' to use agency personnel so extensively, the Union questioned whether the Respondents were complying with the 40-percent cap, and how Respondents monitored such compliance. Jasinski, on behalf of Respondents explained why the Respondents needed to retain the right to use 40 percent of agency employees. However, Jasinski asserted that it was the Union's obligation to monitor compliance with the 40-percent cap, while insisting that Respondents have not violated the contract's restriction.

In these circumstances, the use of agency personnel is clearly relevant to the negotiations. The items requested by the Union in *Milford Manor,* supra, were found by the Board to be relevant in that case, and are also relevant here. The defense of Respondents Monmouth and Pinebrook, that these Respondents were not parties to the prior Board case, while true, is not a valid defense to the relevance of the information. Therefore, I conclude that item 1 in the Union's request of August 30, 2005, is relevant.[65]

In request item 2, the Union asked for lists of A-Best employees used by Respondents including various items such as job title, shift, date of hire, hours worked, wage rate, benefits provided, address, phone number, and social security number. In request item 3, the Union asked for any memoranda or employee handbook outlining the policies of A-Best. Respondents asserted that these requests are irrelevant to the contract negotiations.

Alcoff testified that the Union needed the requested information, in order to develop a counter proposal with respect to agency usage, and to figure out "what actually existed on the ground." As to the request for the handbook, wage rates, and benefits to A-Best employees, Alcoff testified to two reasons justifying the need for this information. Alcoff states that he had anecdotal information he received from employees, that when individuals applied for jobs with Respondents, they never met anyone from A-Best, and were directed by Respondents' officials to fill out A-Best applications. Therefore, he had some doubts that A-Best was real, and thought that A-Best might be "sort of a front for the Employer." Further, Alcoff asserts that since the Union's proposal dealt in part with A-Best employees becoming part of the bargaining unit after a year of employment with Respondents, the Union wanted to be sure that its proposals took into account whatever their existing terms and conditions of employment were at A-Best.

I find that based upon the liberal, broad discovery type standard, that the Union has shown based on Alcoff's testimony that most of these items could be of use to the Union in carrying out its statutory duties and responsibilities. *Dodger Theatricals,* supra, 347 NLRB at 867; *Wisconsin Bell,* supra.

However, I do not believe that the Union has established the relevance of the addresses, phone numbers, or social security numbers of the A-Best employees. I note that Respondents redacted that information, when they finally submitted partial information to the Union, supplied by A-Best concerning work performed for Respondents. Apparently, the Union did not object to these redactions, since it did not request that information again. Respondents also redacted the wage rates paid to A-Best employees. The Union did object to this redaction, and continued to request that information. For the reasons described above in Alcoff's testimony, I agree that such information is relevant and should not have been redacted, by Respondents, when it was sent to the Union.

Having determined that most of the information sought by the Union, in its various requests was relevant, the next question to be decided is whether Respondents supplied such information to the Union in a timely manner. There can be no doubt, that they have not.

While Respondent did provide some information to the Union on September 16, 2005, such as list of new hires and overtime, and Medicaid cost reports, the majority of the information was not provided by Respondents. To the extent that Jasinski testified the Respondents had produced most of the information requested, I do not credit his vague and unconvincing testimony in this regard. Rather, I credit Alcoff's testimony, supported by his letters detailing what items had not been provided.

In early 2007, Respondents finally did provide some limited, but incomplete information with respect to agency employees usage. Such partial compliance, 1 year and 3 months after the request is clearly untimely. I so find. The record does reveal that as detailed above, that Respondents did supply some information to Dichner, the Union's attorney, in connection with the grievance filed by the Union, in 2006. To the extent that the information supplied to Dichner is duplicative of the requests made the Union concerning the negotiations, such information need not be supplied again. Further, Respondent Milford supplied some information in June 2006 to the Union's attorney at that time, in an attempt to comply with the Board's Order. Similarly to the extent that the information supplied to that attorney is duplicative of the requests made by the Union, such information need not be furnished again. In that regard, I disagree with the General Counsel's assertion that since that information dealt with another matter (the prior Board Order), and was submitted to a different attorney, it must be resubmitted by Respondent Milford to the Union. The facts that the information related to a different matter and were turned over to a different attorney, is of no consequence. It was turned over to the Union's attorney, and the Union is responsible for obtain-

[65] This request was repeated by the Union in letters of September 12 and October 10, 2005.

ing such information from its attorney. The compliance stage of this proceeding shall determine which precisely which information is covered, by the above discussion. *Milford Manor,* supra.

The final issue to be determined is whether Respondents have violated the Act, by not complying with the Union's various information requests. I note initially that Jasinski did respond orally to several of the Union's requests, by stating that no such documents exist.[66]

I believe that such a response is sufficient, and that Respondents need not supply information that does not exist. While the Union requested in several followup letters to confirm in writing that some of these items do not exist, I find such a request unnecessary, and that Respondents did not violate the Act by not confirming in writing what had been told to the Union orally, that certain documents requested by the Union, do not exist.

However, that leaves a large amount of information, particularly with respect to agency usage, that Respondents have not produced at all, or that the information produced was incomplete. At the September 12, 2005 collective-bargaining session at Respondent Pinebrook, Alcoff repeated the request that he had made for agency usage information in the Union's August 30 letter. Jasinski in addition to asserting that the information is irrelevant and a stall tactic, told Alcoff that the Union should subpoena information from the agency regarding agency personnel. I have already concluded as detailed above, that the most of the items requested by the Union concerning agency usage, including A-Best's employee handbook is relevant to the Union's role in negotiating a contract. Jasinski's additional response that in effect Respondent Pinebrook, did not have certain information, and the Union could subpoena it from A-Best, is not a valid defense. This same defense was raised by Respondent Milford in *Milford Manor,* supra, and rejected by the Board. In these circumstances, Respondents are required to request that the personnel agencies supply it with the information requested by the Union. *Milford Manor,* supra, 346 NLRB at 51; *United Graphics,* 281 NLRB 463, 466 (1986).[67]

Jasinski responded in writing to Alcoff's August 30, 2005 requests, by letters dated September 8 and 9, 2005, regarding Respondents Monmouth and Pinebrook, respectively. With respect to the Union's relevant request for cost reports, Jasinski responded that these reports "are available to the Union via the staff." Apart from the fact, that Respondents have not established which members of their "staffs" had access to this information, the defense is also not valid. The Union need not attempt to obtain the information from employees, even if that were possible. The information is in the possession of Respondents, I have found it to be relevant and it must be turned over to the Union by Respondents, whether or not it was possible for the Union to obtain the information from employees or other sources.

The primary defense raised by Respondents concerning their failure to turn over information is essentially a three-pronged argument. They contend that at each facility, the parties were at impasse, that the Union has bargained in bad faith with the Respondents, and that the information requests made by the Union were not made in good faith, but only for the purposes of forestalling impasse. *Richmond Electrical Service,* 348 NLRB 1001, 1002–1003 (2006); *ACF Industries,* 347 NLRB 1040, 1041–1043 (2006); *Matanuska Electrical Assn.,* 337 NLRB 680 (2002); *Sierra Bullets,* 340 NLRB 242, 244 (2003); *J. P. Lunsford Plumbing,* 254 NLRB 1360 (1981).

In examining these contentions, it is first appropriate to set forth the applicable law for assessing the existence of an impasse. An impasse exists when the parties are warranted in assuming that the further bargaining would be futile. *Essex Valley Visiting Nurses Assn.,* 343 NLRB 817, 840 (2004); *Larsdale, Inc.,* 310 NLRB 1217, 1318 (1993).

"An impasse exists at a given time only if there is no realistic possibility that continuation of discussions at that time would have been fruitful." *Cotter & Comp.,* 331 NLRB 787 (2000), citing *Television Artists AFTRA vs. NLRB,* 395 F.2d 622, 628 (D.C. Cir. 1968). Further an impasse cannot be found unless *both* parties believe that they are at the end of their rope. *Essex Valley,* supra; *Larsdale,* supra; *Cotter,* supra at 788. Finally, the existence of an impasse is not lightly inferred, and the burden of providing it rests on the party asserting it. *Essex Valley,* supra; *Serramonte Oldsmobile,* 318 NLRB 80, 97 (1995), enfd. 83 F.3d 227 (D.C. Cir. 1996).

Here, in applying these principles, Respondents have fallen far short of meeting their burden of establishing the existence of an impasse at any of the three facilities. Their contentions that impasses existed at Respondents Monmouth and Milford are so ludicrous, that they border on the frivolous. The parties conducted five negotiation sessions at Respondent Monmouth. The first session sometime prior to April 2005, was conducted by Pimplaskar on behalf of the Union. She was replaced by Foley in lead negotiator in April 2005, and Foley led the negotiations on May 11, June 3, and July 8, 2005. Alcoff replaced Foley as the Union's lead negotiator in July 2005, and conducted one negotiation session on behalf of the Union with Respondent Monmouth, on August 12, 2005. This was the last meeting between the Union and Respondent Monmouth. Presumably, Respondent Monmouth contends that impasse was reached at that session, but interestingly presents no facts or arguments in its brief to support a contention that impasse existed at or after that meeting. That omission is not surprising, since the record is devoid of any evidence supporting the existence of an impasse on that date.

During these five sessions the parties reached agreements on some minor language issues, spent most of the meetings discussing the "noneconomic proposals submitted by each party,"

[66] These items include wage surveys used by Respondents, on merit pay, written policy on merit pay correspondence with the Union concerning merit pay, documents describing tuition or training reimbursement, correspondence to employees since September 1, 2005, concerning terms and conditions of employment, copies of personnel policies changes on or after September 1, 2005, and reports or data raised by Respondents to monitor compliance with the contract's restriction on use of agency personnel.

[67] Indeed, I note that subsequently Respondents did make requests of A-Best to submit some information requested by the Union. However, as I have detailed above the submissions were incomplete, with no information covering most of the months requested, and with salary information redacted.

particularly the issue of the use of agency personnel, and spent part of the July 8, 2005 meeting discussing the Union's economic proposal submitted on that date. Notably, the Union's proposal of July 8, 2005, modified its previous proposals on Benefit and Pension Fund contributions. Further, the Union also on July 8, 2005, modified its previous proposal on agency usage, by withdrawing its previous request that agency employees employed regularly for 90 days be made permanent and placed in the unit.

At the last session on August 12, 2005, the parties discussed the issue of agency personnel, the position taken by Respondent Monmouth that LPNs were not in the unit, and Respondent Monmouth's proposal on overtime.

Significantly, there was no specific discussion at this meeting of the Union's economic proposal, submitted on July 8, 2005, and even more significantly, Respondent Monmouth had not submitted an economic proposal at that time, although it had promised to do so, after it received the Union's economic proposal.

Even more significantly, unlike Respondent Milford or Respondent Pinebrook, Respondent Monmouth never submitted a "final offer." And never made any assertion that it considered the parties to be deadlocked or at impasse.

Thus, it cannot even be argued that there was a contemporaneous understanding by both parties that they had reached impasse. *Essex Valley,* supra; *CJC Holdings,* 330 NLRB 1041, 1045 (1996). Thus, Respondent Monmouth's contention that there was an impasse as of August 12, 2005, or at any time, at Respondent Monmouth, is totally without merit.

Furthermore, the evidence discloses that Respondent Monmouth did not fully comply with the Union's requests for information made in January 2005, and renewed both in writing and orally by the Union. More specifically, Respondent Monmouth had not supplied relevant information pertaining to the use of agency personnel. Moreover, the issue of use of agency personnel was the subject of most of the discussions by the parties during these sessions, and the union representatives consistently reminded Respondent Monmouth that such information had not been supplied, and was still needed by the Union. In these circumstances, where Respondent Monmouth has failed to supply information relating to the primary issue under discussion by the parties (agency usage), its failure to do so precludes the finding of a good-faith impasse. *Pecker Coal,* 301 NLRB 729, 240 (1991); *Genstar Products,* 317 NLRB 1293, 1299 (1995); *Orthodox Home for the Aged,* 314 NLRB 1006, 1008 (1994).[68]

Therefore, I reaffirm by conclusion detailed above, that Respondent Monmouth has fallen far short of its burden of establishing that the Union and Respondent Monmouth were at impasse in bargaining at any time.

Respondent Milford fares little better than Respondent Monmouth in its attempt to establish the existence of an impasse. Here, the parties had only three negotiation sessions. At the last session, August 19, 2005, which incidentally was Alcoff's first session as the Union's lead negotiator in bargaining with Respondent Milford, Alcoff presented the Union's modified economic proposal, which was discussed, and wherein Alcoff explained why he felt this proposal represented movement by the Union in several areas such as wages and benefit fund contributions and agency usage.

Respondent Milford then presented for the first time, its economic proposals, which were discussed by the parties. After the discussion ended, Jasinski stated, "[T]his is our final offer." Alcoff responded, "How can it be your final offer? First of all it's your first offer, and second of all there's been no negotiations on it, and you haven't given us any of the information on Agency personnel. You're not proposing anything on the nurses."[69] Alcoff then asked, "How could you call this a final offer?" There's nothing . . . I mean nothing's happened."

Jasinski repeated his assertion, "It's our final offer." Alcoff repeated his assertion that the Union still had outstanding information requests, and still needed questions answered about Respondent Milford's proposals, and the parties should continue to negotiate and schedule additional bargaining dates. Jasinski replied that he did not have his calendar with him, but he would get back to Alcoff concerning scheduling additional bargaining sessions.

I conclude that Respondent Milford has not come close to meetings its burden of establishing the existence of an impasse with the Union on that date or any other time.[70] The parties met only three times, and that the last session, the Union's modified proposal demonstrated movement in several areas, including the primary issue between the parties, agency usage. Thus, the Union had demonstrated flexibility, when Respondent Milford made an "abrupt" declaration that its offer was "final." *Cotter,* supra at 787. See also *NLRB v. Powell Elec Mfg. Co.,* 906 F2d 1007, 1012 (5th Cir. 1990) (no impasse where parties met only five times, and court considers so few meetings "an important factor to be weighed," in assuming the existence of impasse). Accord: *Huck Mfg Co. v. NLRB,* 693 F2d 1176, 1186 (5th Cir. 1988) (limited number of meetings entitled to weight).

Further even though Jasinski declared Respondent Milford's offer was "final," he did not state that he believed that the parties were at impasse. *Essex Valley,* supra at 841. Indeed, when Alcoff correctly disputed how the offer could be "final," he insisted that the parties should continue to negotiate and set additional bargaining dates. Significantly, Jasinski did not object to or dispute the need for more meetings, but merely told Alcoff that he did not have his calendar with him and he would get back to Alcoff. It is therefore clear that neither side believed that impasse had been reached on that date, and there can be no finding that there was a contemporaneous understanding

[68] While the complaint does not allege that Respondent Monmouth violated Sec. 8(a)(1) and (5) of the Act, by failing to supply relevant information to the Union, prior to August 30, 2005, and I make no such finding, that fact is not determinative. Whether or not an employer has violated the Act by not turning over relevant information to the union, the union is entitled to a reasonable time to evaluate such information. If not, no impasse can be found. *Pecker,* supra at 740 and 743; *Larsdale,* supra at 1319.

[69] In that regard, Jasinski had asserted that LPNs are not in the unit.

[70] I note that although Jasinski promised to contact Alcoff to schedule additional sessions, he never did so, notwithstanding repeated attempts by the Union to schedule additional sessions.

of the parties that they were "at the end of their rope." *Cotter,* supra; *Essex Valley,* supra.

Moreover, as was the case with respect to Respondent Monmouth, Respondent Milford had not supplied relevant information to the Union, concerning agency usage. This information had been requested in January 2005 in writing, was followed up by a letter from Foley in May 2005, and orally by Foley at the June 13 meeting, and by Alcoff at the meeting of August 19, 2005. As was the case with Respondent Monmouth, the failure of Respondent Milford to provide the Union with relevant information concerning agency use, the chief issue separating the parties, precludes the finding of an impasse. *Decker Coal,* supra; *Genstar,* supra; *Orthodox Home for the Aged,* supra.[71]

Turning to Respondent Pinebrook, while the parties did have seven negotiation sessions, once again the evidence is far from sufficient to establish the existence of a valid impasse between the parties at any time. Indeed it is not totally clear at what point Respondent Pinebrook contends that an impasse has been established. However, the record discloses that during the September 12, 2005 session, the parties' fifth meeting, Jasinski, after brief discussions of proposals submitted by both Respondent Pinebrook declared that this was its final offer and the parties were at impasse. Alcoff responded, as he had when Jasinski made a similar assertion on August 19, 2005, at Respondent Milford. Alcoff insisted that the parties were not at impasse and that they had just started to bargain, since the latest proposals had just been presented by both parties at that session. Alcoff added that "how could we be at impasse when you're not providing information on these things you've identified as the central thing."[72] Alcoff concluded by stating that he looked forward to getting the information from Respondent Pinebrook and scheduling other sessions. In fact, the parties did schedule another meeting for November 3, 2005, in the presence of two mediators.

Similar to my conclusions set forth above concerning the bargaining at Respondent Milford, the Union's modified proposal submitted to Respondent, which was identical to the proposal submitted to Respondent Milford, represented movement by the Union in several areas, including agency usage and benefit contributions. Also, Alcoff specifically told Jasinski that the Union was "trying to show movement," but needed the information requested on agency usage, which had not been provided, in order to do so.

Thus, Respondent Pinebrook, just as Respondent Milford had done, "abruptly" declared that its offer was final and that it was at impasse, where the Union (and Respondent Pinebrook) had demonstrated flexibility, when Respondent Pinebrook cut short the process. *Cotter,* supra at 787.

Further, Alcoff's reaction to Jasinski makes crystal clear that the Union did not believe that the parties were at impasse. Thus, there was no contemporaneous understanding by both parties that they had reached impasse. *Essex Valley,* supra; *Cotter,* supra; *CJC Holdings,* supra. See also *Huck Mfg.,* supra, 693 F.2d 1176, 1186 (5th Cir. 1982). I also note that the parties met again shortly after this meeting, in the presence of mediators, which reinforces the inference that negotiations were still in process, and that no impasse existed on September 12, 2005. *Huck Mfg.,* supra at 1186.

Finally, as was the case with both other Respondents, Respondent Pinebrook had yet to fully comply with the Union's requests for information, concerning the key bargaining issue of agency usage. In this case, the Union had reviewed its request in writing on August 30, 2005,[73] and orally by Alcoff at the September 12, 2005 meeting. Thus Respondent Pinebrook's continued refusal to supply this relevant information to the Union, precludes a finding of impasse on September 12, 2005. *Decker,* supra; *Larsdale,* supra.

The parties met again on November 3, 2005, in the presence of two mediators. During this meeting, Alcoff demonstrated further movement by stating that he wanted to figure out how to get to a deal, and suggested the possibility of a 1-year probationary period for new hires, which was in response to what Alcoff viewed as Respondents' "unspoken agenda," in insisting on retaining agency usage to avoid paying benefits. Once again, Jasinski declared the parties to be at impasse. Once more, I believe that this "abrupt" declarations by Jasinski, was premature, and that flexibility had been shown. *Cotter,* supra.

Further, it is clear that Alcoff did not believe that impasse existed at that meeting, and that both parties must believe that "they are at the end of the rope." *Cotter,* supra; *Essex Valley,* supra.

Finally, the Union's information request still had not been complied with as of that meeting, a fact that Alcoff repeatedly stressed to Respondent Pinebrook and to the mediators. Accordingly, I find that this failure to provide relevant information on the chief obstacle to an agreement, precludes a finding of impasse. *Decker Coal,* supra; *Larsdale,* supra.

Respondents argue alternatively that the Union has bargained in bad faith with the Employers, by insisting on "take it or leave it," positions during bargaining. *Graphic Arts Union Local 280,* 235 NLRB 1084, 1096 (1978), enfd. 596 F.2d 904 (4th Cir. 1979); *Teamsters Local 418,* 254 NLRB 953, 957 (1981). They further contend that the Union's unlawful fixed positions was sufficient to establish the existence of an impasse. *Richmond Electrical,* supra; *J. D. Lansford Plumbing,* supra. Finally, Respondents assert that they did not violate the Act by failing to or delaying the turning over of information to the Union, because the Union's requests were not made in good faith, and were purely "tactical" and were made for the purpose of delay and to foreclose a finding of impasse. *ACF Industries,* 347 NLRB 1040, 1043 (2005).

I conclude that the credible evidence does not support Respondents' contentions, and that the Union's bargaining conduct, provides no defense to Respondents' blatant and perva-

[71] Once again, as I discussed with respect to Respondent Monmouth, the failure of the complaint to allege the failure of Respondent Milford to turnover information to the Union prior to August 30, 2005, to be violative of the Act is not determinative. *Decker Coal,* supra; *Larsdale,* supra.

[72] Referring to the agency use issue.

[73] I note that the complaint does allege that Respondent Pinebrook's refusal to comply with the Union's August 30, 2005 information request is violative of the Act.

sive refusals to submit complete and timely information to the Union.

Respondents adduced testimony from Jasinski that both Foley and Alcoff, the primary negotiators for the Union, made statements during bargaining sessions to the effect that certain issues were not negotiable, that the Union could not deviate from the terms agreed to in the Tuchman negotiations, because of the existence of a Most-Favored National Clause in the Tuchman agreement. Thus, if the Union gave a better deal to Respondents it would have to give it to all the other Employers.[74] I do not credit Jasinski's testimony in this regard. Rather, I credit Alcoff's denials, supported by Foley that no such statements were made by either of these negotiators during negotiations, or in a phone call.[75] Rather, I credit Alcoff's testimony that he did mention the Tuchman Agreement several times during bargaining, only in the context of explaining why he felt that Respondents should agree to these terms. Thus, I find that he explained that the Union had obtained wage increases, and fund contributions increases for other employers, including those involved in the Tuchman negotiations. Alcoff explained that the Union had helped to obtain State legislative relief for these Employers, and who were able to provide these increases. Alcoff added that since these employers were able to provide these increases, so why would Respondents want to take it out on their workers, and explain to them why they are not worth it. I also find as testified to by Alcoff, and not disputed by Jasinski, that the Tuchman Agreement never came up in connection with the parties discussion of the agency use issue, and the Union never took the position that the Union's agency proposal needed to be accepted, because it appeared in the Tuchman Agreement.

I credit Alcoff's testimony as set forth above for several reasons, in addition to comparative testimonial demeanor. Both Foley and particularly Alcoff are experienced negotiators, and I doubt that they would be likely to inform Respondents that items were "nonnegotiable," or that the Union couldn't deviate from the terms of the Tuchman Agreement, because the Most-Favored Nations Clause in that Agreement would require the Union to give the same deal to the other employers. Further, Alcoff's credible and unrefuted testimony establishes that it is unlikely that any Tuchman Employers would invoke the Most-Favored Nations Clause. The clause speaks in terms of "Net economic impact," which is not simple to ascertain in a nursing home setting. No "Tuchman" Employer has invoked the Most-Favored Nations Clause in the Agreement. Finally, the Union has signed numerous contracts with employers which contained less favorable terms then in the Tuchman Agreement including 13 New Jersey Nursing Homes, that did not participate in the Union's Funds.

I also rely on the limited corroboration of Jasinski's testimony by Harris. I note in that regard that Harris was present during all the negotiation sessions, where Foley and or Alcoff, allegedly made the statements attributed to them by Jasinski. She did not corroborate Jasinski with any of his specific assertions as to what Alcoff and Foley allegedly said. Harris did testify that at one session a June 29 side bar, Alcoff said that he "wanted the same agreement as the Tuchman Agreement." Interestingly, Jasinski did not testify that Alcoff made such a statement, or any comment about the Tuchman Agreement during the June 29, 2005 meeting.

I note that I have considered the testimony of Gloria Archer in making the above credibility resolutions. I have found above that on September 12, 2005, during a caucus at Respondent Pinebrook, the union officials and committee were discussing Respondent Pinebrook's offer. During that discussion, Alcoff mentioned that the employers of Respondent Pinebrook do the same work as the employees in other contracts with the Union, including the Tuchman Agreement. Thus, Alcoff argued to the committee that "don't you think you're worth it, why should we settle for less, why should you accept less." I find these comments consistent with Alcoff's testimony detailed above, that he mentioned the Tuchman Agreement during negotiations, in the context of arguing that Respondents' employees are "worth" as much as those of other employers who are parties to the Tuchman Agreement. These remarks do not suggest that Alcoff would characterize items as "nonnegotiable," or would state as Jasinski testified that the Union could not deviate from the terms of the Tuchman Agreement, because of the Most-Favored Clause.

I have also considered the memorandum distributed by Union Representatives Norman DeGeneste to union members, stating that the Union had made "great strides in establishing a statewide standard for nursing home workers." I do not find anything in this memorandum, inconsistent with Alcoff's testimony, that he argued during negotiations that Respondents should grant similar benefits to their employees, that were agreed upon by other employers in the industry.

However, I have not considered the affidavit submitted by Respondents signed by Gene Dalton, who is deceased. I find that this affidavit does meet the requirement of "equivalent circumstantial guarantee of trustworthiness," which the Board normally accords to affidavits taken by Board agents, and which are admissible. See discussion of this issue in *Weco Cleaning Corp.,* 308 NLRB 310, 314–315 (1992). Here, the affidavit was taken not by a Board agent (a neutral person at that point), but an interested party, Eleanor Harris, an official of Respondents. The affidavit was prepared by Respondents' attorney, allegedly based on notes taken by Harris of her interview with Dalton. I find that in these circumstances, there is little support for the conclusion that this affidavit can be considered "trustworthy." I recognize that in *Weco,* supra, the ALJ received and relied on an affidavit prepared by the attorney for the charging party. However, the ALJ relied upon the evidence that the attorney had formerly been employed by the agency, and who testified that he utilized the same practices and procedures when he took the affidavit of the deceased witness. Based on that fact, the ALJ received and relied upon the affida-

[74] Jasinski also testified to a phone conversation with Alcoff, allegedly before Alcoff became lead negotiator. According to Jasinski, Alcoff informed him that it would be a fruitless exercise for Respondents to try and negotiate a contract that deviated from the Agreement that the Union was negotiating with the Tuchman group. Alcoff denied such a conversation.

[75] As noted, Jasinski asserted that Alcoff made similar statements to him in a phone conversation in April 2005. I credit Alcoff that no such conversation took place.

vit. There is no such evidence here, as the affidavit was prepared by an attorney, who did not even interview the witness, based on notes taken by an interested party, Eleanor Harris.[76]

Further even if I were to find that the affidavit meets the requirement of "trustworthiness," the Board instructs that such statements are "considered only with the utmost care and caution and that weight may be given to them only when they are wholly corroborated by clear and convincing testimony of other witnesses or documentary evidence." *Corporate Interiors, Inc.,* 340 NLRB 732, 748 (2003); *Custom Coated Products,* 245 NLRB 33, 35 (1979). Further evidence "must be evaluated with maximum caution only to be relied upon if and when consistent with extraneous objective and unquestionable facts." *American Tissue Corp.,* 336 NLRB 441 (2001), *Weco,* supra.

Here, I find that the evidence in Dalton's affidavit falls far short of meeting these standards, and cannot be accorded any weight. *Corporate Interiors,* supra; *Custom Coated Products,* supra.

On the other hand, I have considered the testimonies of Jasinski and Harris concerning Pimplaskar's alleged statements at the first bargaining sessions for each Respondent, to the effect that certain items, such as health insurance and agency were "nonnegotiable." While Pimplaskar did not testify herein, although she was subpoenaed by the General Counsel,[77] the General Counsel did introduce into the record, Pimplaskar's testimony in another proceeding *(Laurel Bay Health Care),* where she testified in response to similar accusations by Jasinski, that she never said in the bargaining in those cases, that certain terms were nonnegotiable such as health care and pension contributions. Pimplaskar in that proceeding did admit that she told Jasinski that the proposals submitted were part of the Union's "statewide goals." The General Counsel urges that I credit Pimplaskar's testimony in that proceeding, and conclude that she did not make similar remarks in this proceeding. I disagree.

Although the issues and witnesses testimony were similar in both proceedings, concerning this issue, that was a different trial, and Pimplaskar did not appear before me. More importantly, Judge Davis did not make a credibility resolution vis-á-vis Jasinski and Pimplaskar, although he did with respect to Jasinski vis-á-vis Alcoff.

In such circumstances, I do not find it appropriate to credit Pimplaskar's denials of Jasinski's testimony. In this regard, while I do find it unlikely that Pimplaskar would make such statements, it is not impossible, particularly in view of the evidence in the record, of her inexperience as a negotiator. Therefore, for the purposes of this decision, I shall assume without deciding, that Pimplaskar made the comments attributed to her by Jasinski and Harris, at the initial bargaining sessions for each Respondent.

[76] I note that the Board agreed with the ALJ's decision to receive the affidavit, but pointedly found a prima facie case of discrimination even without considering the evidence in the affidavit. This suggests some concerns by the Board with the ALJ's receiving and relying on the affidavit. See 308 NLRB 310, 310–311, and fns. 2 and 7.

[77] She no longer is employed by the Union.

Turning to an examination of the credited evidence as detailed above, I cannot conclude that Respondents have established that the Union has bargained in bad faith. Respondents argue that the Union's bargaining demonstrated a fixed and inflexible take it or leave it position, in that it would not agree to any deviation from the terms of the "Tuchman" Agreement, due to the presence of a Most-Favored Nations Clause in that agreement. *Graphic Arts Union Local 235,* supra; *Teamsters Local 418,* supra. I cannot agree.

Initially, it must be recognized that the Union has the legitimate right to seek for its members the same terms and conditions of employment that the Union has negotiated with other Employers. *Teamsters Local 282 (E. G. Clemente Contracting),* 335 NLRB 1253, 1255 (2001); *Mine Workers v. Pennington,* 381 U.S. 657, 665 (1965).

The Union must bargain in good faith about such matters, and the Union's obligation in this regard is the same as that of an Employer in bargaining with a Union. The applicable law is aptly summarized by the Board in *Industrial Electric Reels, Inc.,* 310 NLRB 1069 (1973):

> Whether an employer has fulfilled its statutory duty to bargain in good faith depends on whether its conduct at the bargaining table (and elsewhere) demonstrates a real desire to reach agreement and enter into a collective-bargaining contract. "The essential thing is . . . the serious intent to adjust differences and to reach an acceptable common ground." Because the existence or nonexistence of good faith depends on the employer's desire or intent, the Board must consider the employer's overall conduct. In this regard, Section 8(d) specifically provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Thus, the Board has held that "[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." However, entering negotiations "with a predetermined resolve not to budge from an initial position" betrays an attitude inconsistent with good-faith bargaining. Statements made at the bargaining table may, of course, be evidence of an intention not to bargain in good faith. However, the Board is careful not to "throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining," because to do so would frustrate the Act's policy of encouraging free and open communications between parties.
>
> A party may be found to have violated its duty to bargain in good faith by maintaining a "take-it-or-leave-it" attitude while going through the motions of bargaining. Thus, "if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its 'take-it-or-leave-it' approach to bargaining," [Footnotes omitted. Id. at 1071–1072.]

In applying these principles here, I find that while the statement allegedly made by Pimplaskar at the start of negotiations that certain items were nonnegotiable may be evidence of bad

faith,[78] it is not per se unlawful. The determination of whether a party making such comments has bargained in bad faith must be based on the totality of that parties conduct. *Industrial Electric,* supra at 1073 (statement by employer negotiator "take it or leave it," insufficient to establish unlawful refusal to bargain); *St. George Warehouse,* 341 NLRB 904, 908 (2004) (statement by lead negotiator that "you're not going to get a contract and the Union is going to abandon the shop"). As the Board observed in *St. George,* supra, "Where the overall bargaining conduct indicates good faith and willingness to bargain, a stray statement indicating inflexibility will not overcome the general tenor of good faith negotiation." Id. at 908, citing with approval, *Pleasantview Nursing Home v. NLRB,* 351 F.3d 747, 758 (6th Cir 2003) (statement made by negotiator that certain proposals were "nonnegotiable," found to be "mere rhetoric" and not an accurate reflection of employer's bargaining stance).

Therefore, as the above precedent makes clear, it is necessary to examine the overall bargaining process order to assess whether the Union has "entered into negotiations with a predetermined resolve not to budge from an initial position." *Industrial Reels,* supra at 1073.

I have found above that the positions of Respondents Monmouth and Milford that an impasse existed, when these Respondents cut off negotiations on August 12 and 19, 2005, respectively, "bordered on the frivolous." I find similarly with respect to their contentions that the Union bargained in bad faith with these Respondents.

Respondent Monmouth and the Union had only five negotiation session. During these meetings, the parties reached some agreements on minor language issues, and discussed extensively the agency usage issue. The Union continually asked Respondent Monmouth for the information previously requested, and the parties discussed the Union's economic proposal, submitted on July 8, 2005. In that connection, the Union modified its previous proposal on contributions. Thus, its previous proposal called for increases of from 21 percent of payroll, which rate as could be adjusted by the trustees to as much as 24 percent during the agreement. On July 8, 2005, the Union gave Respondent on option of agreeing to payments of 22.33 percent of payroll but, with no provisions for increases during the Agreement. Foley explained this modification, and indicated to Respondent Monmouth, that the Union was "indifferent" as to which proposal Respondent Monmouth accepted. The Union's July 8 proposal also contained a modification of its prior proposal for pension contribution, and significantly in its prior agency usage proposal. In that regard, Foley explained that the Union eliminated its prior request that temporary employees scheduled to work 90 days or more be made permanent and be included in the unit.

Thus, with respect to the two areas that Pimplaskar had allegedly stated were nonnegotiable, benefit contributions and agency usage, the Union made modifications in their proposals. Notably, these modifications were made by the Union, prior to Respondent Monmouth having submitted an economic proposal.

The parties met for the last time on August 12, 2005, Alcoff's first meeting as lead negotiator. After another discussion of the missing information, still unsupplied by Respondent Monmouth, the parties discussed the agency usage issue. Jasinski mentioned statements allegedly made by Pimplaskar and Foley about terms being nonnegotiable and the Tuchman Agreement. Alcoff responded that he was there to negotiate a contract, and he was not going to deal with what other people said. Respondent Monmouth had still not submitted it's economic proposal to the Union. There have been no further meetings.

In these circumstances, I conclude, that Respondent Monmouth has not come close to establishing the Union's bad faith or "a predetermined inflexible position" or any issues. The parties have had only five meetings, and Respondent Monmouth had yet to submit an economic proposal. The parties bargained about the Union's proposals, and the Union made modifications of its previous proposals on benefit and pension contributions, and agency usage, even without a counterproposal from Respondent Monmouth. Notably, this included modifications in the two areas that Pimplaskar had allegedly stated were "nonnegotiable." The Union explained its proposals and attempted to justify its bargaining positions. *Teamsters Local 705 (Kanakee-Iroquois),* 274 NLRB 1176, 1177–1178 (1985) (union did not violate 8(b)(3) despite its negotiators statements that there wasn't going to be any deviation between contract agreed upon by association, and the employer, employer would have to agree with all terms negotiated with association, and the union "would not and could not agree to any settlement," different from settlement with association).

Finally, in the absence of any economic counterproposal from Respondent Monmouth, it was much too early in the bargaining to conclude that the Union had or would "maintain an inflexible" position. Cf. *Newcor Bay City Division,* 345 NLRB 1220, 1239, 1241 (2005).

Respondent Milford's contention that the Union bargained in bad faith with it suffers from similar deficiencies. There the parties bargained for only three sessions. As in the bargaining at Respondent Monmouth, there were a few agreements reached on minor issues, the Union reviewed its request for missing information, and the parties discussed the agency usage issue, and discussed the Union's modified economic proposal.

The modified proposal with respect to benefit contributions, was the same as it had submitted to Respondent Monmouth, providing for a change to 22.33 percent of payroll with no opportunity to raise the rate to 24 percent, as in the prior agreement. The modification also moved the effective date of increases back 4 months. Alcoff explained these modifications, and why it provided Respondent Milford with more stability and less exposure.

The Union also modified its agency use proposal, from eliminating the 40-percent cap to retaining the cap for the first year of the contract, and then gradually reducing the percent from 30 to 20 to 15 percent by March 1, 2008. Alcoff explained the reasons for its proposal, and indicated that he believed that the improved wage rates proposal by the Union

[78] *U.S. Ecology,* 330 NLRB 223, 225 (2000); *Mid-Continent Concrete,* 336 NLRB 258, 261 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *Romo Paper,* 220 NLRB 519, 524 (1975).

would enable Respondent Milford to recruit and retain staff, and have less of a need to hire agency personnel.

At these sessions, Respondent Milford did provide an economic proposal, which included wage increases of 12 percent over 3 years, but no "parity" increases as requested by the Union. The proposal includes a number of give backs, including no contributions to the Union's training, education, alliance, or legal funds, a change in agency usage clause, eliminating the prior requirement of an agency employee becoming a unit employee after 1 year of employment. It also called for merit pay, at the sole discretion of the Respondent Milford, and not subject to the grievance procedure.

After a caucus, and brief discussion of some of the Respondent Milford proposals, and Respondent Milford's position that LPNs were not in the unit, Respondent Milford announced that "this is our final offer." Alcoff disputed that assertion, questioned how that could be true, since the parties hadn't negotiated as to Respondent Milford's offer, and had not supplied the Union with information. Alcoff asked to continue negotiations and set additional bargaining dates. Jasinski replied that he did not have his calendar with him, but he would get back to him. However, Jasinski never contacted the Union to schedule any further meetings, as he promised, despite repeated requests from the Union to set up another meeting.

Similar to my conclusions set forth above concerning Respondent's Milford's contention that there was an impasse as of that time, and Respondent Monmouth's contention, that the Union bargained in bad faith with it, the contention that the Union bargained in bad faith with Respondent Milford is totally devoid of merit.

The parties had barely begun to bargain, and had only briefly discussed Respondent Milford's economical proposal, when Respondent Milford abruptly and prematurely declared it to be its "final offer." More significantly, even during these limited bargaining that took place, the Union made modifications in its prior proposals on benefit contributions and agency usage.[79]

Further, the Union explained and discussed its reasons for its proposals, and its objections (albeit briefly), to some of Respondent Milford's proposals. *Kanakee-Iroquois,* supra.

Accordingly, I find that Respondent Milford has fallen far short of establishing that the Union bargained in bad faith or entered into negotiations "with a predetermined resolve not to budge from its initial position." *Industrial Electric Reels,* supra; *St. George Warehouse,* supra; *Pleasantview Nursing Home,* supra; *Kanakee-Iroquois,* supra.

Respondent Pinebrook fares no better than Respondent Monmouth or Respondent Milford, in its assertion that the Union has bargained in bad faith with it. Although the parties bargained more extensively at Respondent Pinebrook,[80] than they did at other facilities, the bargaining was essentially the same. The Union introduced the same proposals that it had submitted to Respondents Monmouth and Milford. The parties discussed these proposals, as well as the counter proposal submitted by Respondent Pinebrook. The Union explained its position on both its proposal and why it objected to Respondent Pinebrook's proposals. *Kanakee-Iroquois,* supra, 279 NLRB at 1177.

The Union demonstrated flexibility by proposing modifications in both its Health plan proposal, including the same alternative it proposed to the other facilities of 22.33% of payroll, with no provision for increases during the term of the agreement. The Union also offered to move the effective date of the increases 2 months, which represented a savings to Respondent Pinebrook.

Further, at the November 3, 2005 meeting with the mediators, Alcoff demonstrated once more the Union's flexibility, by stating that he wanted to figure out a way to get a deal, and at the meeting of January 24, 2007, Alcoff suggested that Respondent Pinebrook make a proposal for a different health plan, if it was so unhappy with the Union's plan.[81] See *Laurel Bay Health Center,* 353 NLRB No. 24, slip op. at 2 (2008) (employer did not test union's willingness to move).

The Union also offered modifications in its agency usage proposal, which was clearly the chief obstacle to an agreement. Moreover, at the meeting with the mediators on November 3, 2005, Alcoff further demonstrated the Union's flexibility by making several "what if" proposals, including that the parties could live with the status quo and "manage the agency thing," by compromising on other issues such as union access. Alcoff also indicated that since he believed that part of Respondents' desire to retain the right to use agency employees, was to avoid paying benefits, he suggested a 1-year probationary period for all new hires.[82]

Notwithstanding these demonstrations of flexibility by the Union, Jasinski declared Respondent Pinebrook's offer to be "final," and prematurely declared impasse. It then refused to meet with the Union for an entire year, and only did so after the Region issued its initial complaint.

In these circumstances, it is hard to see how Respondent Pinebrook can argue that the Union has bargained in bad faith. In this connection, Respondent Pinebrook argues that a comparison of the Union's proposals submitted to it (as well as to the other Respondents), reveals substantial similarity to the terms of the Tuchman Agreement. It also points to Alcoff's admission that he stated at Respondent Pinebrook sessions, that the Union had reached agreements with other employers, including the Tuchman Agreement, and that the employees at Respondent Pinebrook were doing the same work, therefore how could Respondent Pinebrook justify paying the employees less.

However, as I have noted above in my factual findings, while there are some similarities in the proposals of the Union and Tuchman Agreement, there are also several significant differences, particularly in the crucial agency usage provisions, as well as in the effective date of the Health Plan contributions.

[79] I note again that this action by the Union refutes any reliance on Pimplaskar's alleged prior statement that these items were nonnegotiable.

[80] They had seven sessions, including one in the presence of mediators.

[81] Jasinski had criticized the Union's plan throughout the bargaining in various ways, and called it "a terrible plan."

[82] The current contract provided for a 90-day probationary period.

More importantly, as I observed above, it is not unlawful or improper for a Union to seek to "vigorously to implement" the terms of an agreement it has reached with other employers, upon several employers in the area. *E. G. Clemente Contracting,* supra, 335 NLRB at 1255. Thus, Alcoff's statements are consistent with that principle and are not indicative of any unlawful conduct.

Since as I have detailed above, the Union's bargaining has demonstrated movement and flexibility, particularly in the main areas of dispute, it cannot be found to have bargained in bad faith. *Kanakee-Iroquois,* supra; *St. George Warehouse,* supra.

Further, the evidence demonstrates that Respondent Pinebrook has failed to produce relevant information to the Union in a timely and complete fashion, from the start of negotiations, particularly involving the issue of agency usage, the primary subject of the bargaining. Indeed, portions of several of the bargaining sessions were spent discussing this issue, and why Respondent Pinebrook was not complying with the Union's requests. Its initial position that much of the information was not in its possession and the Union could subpoena it from the agency, is unlawful and not a valid defense. *Milford Manor,* supra. Thus, the failure of Respondent Pinebrook to submit this information, not only precluded the finding of an impasse, as I have detailed above, but also tainted the bargaining so significantly, that a finding of bad faith by the Union cannot be found. As the Board has found in the context of assessing an employer's conduct, "A Union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the Employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found." *Times Publishing Co.,* 72 NLRB 676, 683 (1947). I find therefore that Respondent Pinebrook's failure to provide relevant information to the Union, precludes the testing of its assertion that the Union bargained in bad faith with it, by an inflexible or "take it or leave it bargaining position."[83]

Respondent Pinebrook's final argument in defense of its conduct,[84] is somewhat related to its "bad-faith bargaining" contention that I have rejected. The argument is that the Union's information requests were not made in good faith, but rather in bad faith in order to forestall a finding of impasse. *ACF Industries,* supra. In this regard, Respondents argue that Alcoff submitted its August 30, 2005 information request shortly after Jasinski declared impasse at Respondent Milford. However, Respondents conveniently ignore the facts that with respect to Respondent Milford, these same requests had been made previously by the Union in January 2005, and repeated by Foley in May 2005, and still had not been complied with by Respondent Milford. Further contrary to Respondents' contention, Jasinski did not declare impasse at the Respondent Milford bargaining, but merely stated that it was making a "final offer."

With respect to Respondent Monmouth, there was not even a final offer, much less a declaration of impasse. Respondent Monmouth simply declined to meet with the Union, after the August 12, 2005 meeting.

As for Respondent Pinebrook, the August 30, 2005 information request of the Union, in addition to being a repeat of prior requests, was before Respondent Pinebrook presented its final offer and declared impasse on September 12, 2005.

Respondents also argue that the Union's requests were duplicative and that Respondents had supplied all the information in its possession. While it is true that some of the requests were duplicative, that is because Respondents had continually failed to supply information, particularly regarding agency usage, so that the Union was compelled to repeat its requests. Further, I have found above that Respondents had not supplied all the requested information in its possession, and that to the extent that it did not have some information requested, it was required to request such information from the agencies. *Milford Manor,* supra.

Accordingly, having rejected all of Respondents' defenses, I conclude that each of them have violated Section 8(a)(1) and (5) of the Act, by failing to supply complete and timely information to the Union.

B. The Alleged Refusal to Meet

Section 8(d) of the Act requires an employer to meet at reasonable times with the collective bargaining the representative of its employees. *Laurel Bay,* supra, ALJD slip op. at 19; *Barclay Caterers,* 308 NLRB 1025, 1035 (1992); *Crispus Attucks Children's Center,* 299 NLRB 815, 838 (1998).

Here, the evidence is overwhelming that all three Respondent's have fallen far short of fulfilling its obligation to meet at reasonable times with the Union. The record discloses that Respondents Milford and Monmouth last met with the Union in August 2005, and had no further meetings. Respondents Monmouth and Milford argue that "when it became obvious that Monmouth and Milford Manor would not concede to the Union's unreasonable and fixed bargaining position, the Union simply stopped bargaining with them." Aside from the fact that I have found above, that the Union did not maintain an "unreasonable fixed bargaining position," as asserted by Respondents, the evidence does not disclose that the Union stopped bargaining with these Respondents.

Rather, at the last meetings for these Respondents, Alcoff requested that another meeting be scheduled. Jasinski replied that he did not have his calendar, but he would get back to Alcoff to schedule additional meetings. Jasinski never got back to Alcoff with regard to scheduling any additional meetings for either Respondent.

However, in a letter of September 8, 2005, in response to Alcoff's information request of August 30, 2005, with respect to Respondent Monmouth, Jasinski after detailing Respondent Monmouth's position with respect to the information request,

[83] I emphasize that apart from the information issue, I have concluded above that the Union's bargaining demonstrated sufficient flexibility in itself, to preclude a finding of bad faith. However, if that finding is reversed, I would conclude that the failure of Respondent Pinebrook to supply relevant timely information to the Union so tainted the bargaining, that a bad faith finding against the Union cannot be found.

[84] Respondents Monmouth and Milford raise similar arguments.

asked to be contacted by Alcoff for dates to continue negotiations at this facility.[85]

During October 2005, Alcoff made at least three phone calls to "Concetta," Jasinski's secretary, requesting bargaining dates for all three Respondents. Alcoff furnished "Concetta" with several dates of availability, and asked her to have Jasinski call to schedule dates. Concetta told Alcoff that Jasinski was out of town. At some point Concetta called Alcoff and scheduled a meeting for Respondent Pinebrook for November 3, 2005. No dates were offered and no meetings were scheduled for Respondents Monmouth or Milford.

On November 2, 2005, Alcoff wrote to Jasinski, in response to Jasinski's letters of October 28, 2005, regarding all these Respondents which had accused the Union of bargaining in bad faith and denied the Union's request for interest arbitration.[86] Alcoff sent a single reply referencing all three Respondents. He denied Jasinski's allegations that the Union bargained in bad faith, and reminded Jasinski that Respondents had failed to respond to numerous information requests, and had "failed to agree to bargaining dates."

After explaining why he felt that the request for interest arbitration was appropriate, Alcoff renewed the Union's information requests, and asked for "additional dates in November and December."

As noted above, the parties did meet at Respondent Pinebrook on November 2, 2005. However, Jasinski did not offer any dates for bargaining for either Respondent Monmouth or Respondent Milford.

On December 28, 2005, Alcoff by letter, requested negotiations for all three Respondents, offered specific dates of January 4, 18–20, and the week of January 23, 2006. This letter was ignored by Jasinski, resulting in a followup letter of January 19, 2006, for all three Respondents, requesting negotiations and offering all dates between February and March 2, 2006, to meet at any of the facilities.

This letter was also ignored by Jasinski. He did sent a letter to the Union dated January 23, 2006, requesting information from the Union. This letter did not offer any dates for bargaining nor any indication of his availability for any of the dates offered by Alcoff. Alcoff responded by letter of January 25, 2006, enclosing the information requested by Jasinski, and added that "I look forward to hearing from you regarding dates for bargaining."

However, Jasinski ignored this request as well, and made no attempt to schedule any meetings for any of the Respondents at that time. On June 23, 2006, Alcoff sent a letter to Jasinski, regarding all three Respondents, requesting additional and updated information, and noting that there had not been a bargaining session in many months, and requested available dates bargaining at each facility. Jasinski once again, ignored this letter and scheduled no bargaining dates for any of the Respondents.

Finally, on November 1 and 2, 2006 (after the Region issued its initial complaint), Jasinski responded to Alcoff with respect to Respondents Monmouth and Milford, respectively. After once again accusing the Union of bad-faith bargaining, Jasinski asserted "notwithstanding that the parties are at impasse, and your continued bad faith bargaining tactics, we would be willing to schedule another negotiation session with the Union."

Alcoff responded by separate letters dated December 1, 2006. After disputing Jasinski's characterization of the parties prior bargaining, Alcoff added that the Union welcomed the resumption of collective bargaining, and offered to meet any day during the weeks of December 12 and 19, 2006.

While Jasinski apparently did respond to these letters, since the responses are not in the record, it is not clear what he said in these letters with regard to his availability to bargain with either Respondent.

Alcoff sent letters to Jasinski dated January 9, 2007, with regard to Respondent Monmouth, and January 10, 2007, with respect to Respondent Milford. These letters refer to Jasinski's prior letters, and stated Alcoff's availability to bargain at each facility. At Respondent Monmouth, Alcoff offered January 23, 24, 30, and 31, 2007.

For Respondent Milford, Alcoff stated his availability as the weeks of January 22 and 29. Alcoff added that "scheduling these dates will need to be coordinated among your multiple clients."

Jasinski did not reply to this letter, and made no further efforts to schedule any meetings with the Union for Respondent Monmouth or Respondent Milford. In fact, there have been no meetings between these parties since August 2005.

Based on the above facts, there can be no doubt that Respondents Milford and Monmouth have failed to meet at reasonable times with the Union. These Respondents have not met with the Union since August 2005. Contrary to Respondents' assertion, the Union has not "stopped bargaining" with them, but has made numerous requests to meet, both orally and in writing, which requests have been totally ignored by Respondents between August 2005 and November 1 and 2, 2006.

While Respondents did indicate in these letters, a willingness to meet with the Union, it did not follow up on this alleged desire to meet, and never agreed to another date to meet with the Union, and failed to respond to the Union's January 2007 letters, offering specific dates for negotiations for these two facilities.

Respondents appear to be defending their failure to meet by their assertion that the parties were at impasses when negotiations ended in August 2005.[87] I have found above, that the parties were not at impasse at either facility in August 2005, and that Respondents had not established bad-faith bargaining by the Union. Therefore, these defenses by Respondents are rejected.

Accordingly, I conclude that Respondents Milford and Monmouth have refused to meet at reasonable times with the

[85] The record does not contain any response by Respondent Milford to the August 30, 2005 information request, and no offer by Respondent Milford to continue negotiations.

[86] I note that these October 28, 2005 letters did not offer any dates for bargaining in any of the three facilities.

[87] Jasinski stated in his letters to the Union in November 2006, that these Respondents had not met with the Union since August 2005, because of the existence of an impasse, as well as the Union's bad-faith bargaining.

Union in violation of Section 8(a)(1) and (5) of the Act. *Laurel Bay,* supra; *Barclay Caterers,* supra; *Crispus Attucks Center,* supra.

At the end of the November 3, 2005 meeting, Respondent Pinebrook again declared impasse, and the Union disputed that contention, Alcoff stated that the parties were not at impasse, since Respondent Pinebrook had still not provided information on the central issue. Alcoff asserted that he was available to meet every date between then and Christmas, except for Thanksgiving and Christmas. Alcoff also asked the mediators to be present. However, Jasinski did not agree to another meeting on that day. Further, Jasinski never responded to the numerous written requests for additional meetings by Alcoff on December 28, 2005, January 19 and 25, 2006, and June 23, 2006.

Finally, by letter dated October 31, 2006 (after the initial complaint was filed), Jasinski wrote to Alcoff concerning Respondent Pinebrook. This letter, similar to the letters Jasinski wrote to Alcoff at that time concerning Respondents Monmouth and Milford, accused the Union of bad-faith bargaining. Jasinski added that Respondent Pinebrook was aware that employees had signed a petition stating that they do not want the Union to represent them. Jasinski concluded that letter by asserting, "[W]e will not violate any laws by negotiating a contract with a Union who does not represent the employees." Alcoff responded to this letter on December 1, 2006, by denying that the Union had bargained in bad faith, and denying that the parties were at impasse. Alcoff added "that the Union continues to be the exclusive bargaining representative of the employees. The discontent over the lack of progress in these negotiations, shared by the Union as well as employees, is a result of your continued unfair labor practices." Alcoff also offered to meet during the weeks of December 12 and 19, 2006.

Jasinski responded to Alcoff's letter on December 28, 2006, and apparently changed Respondent Pinebrook's position with regard to meeting with the Union. Jasinski asserted notwithstanding the Union's bad-faith bargaining, Respondent Pinebrook was willing to give the Union "another chance," and meet with the Union. He suggested meeting during the week of December 26, 2006, or the first week of January 2007. As related above, the parties did meet at Respondent Pinebrook on January 24, 2007. At the close of that meeting, Alcoff asked to schedule additional sessions. Jasinski replied that he did not have his calendar with him. No further meetings have been held by the parties.[88]

As the above facts demonstrate, between November 2, 2005, and January 24, 2007, there were no meetings between the parties, despite numerous written and oral requests by the Union. These requests were totally ignored by Respondent Pinebrook, until Jasinski's letter of October 31, 2006. In that letter, Respondent continued its refusal to meet with the Union, and argued that it would not do so because of the employee petition, stating that employees no longer wish to be represented by the Union. It was not until December 20, 2006, when Respondent Pinebrook, by Jasinski agreed to meet with the Union, which meeting took place on January 24, 2007. It is clear that Respondent Pinebrook has failed to meet at reasonable times with the Union between November 2, 2005, and January 24, 2007. I so find.

Respondent defends its refusal to meet on the grounds that the parties were at impasse. I have rejected that contention, as detailed above. Respondent also argues that the Union was to blame for the long hiatus in bargaining, since it made no requests to bargain with Respondent Pinebrook, between March 4 and June 23, 2006, due to an internal union election. I disagree. The Union made numerous requests for additional meetings with Respondent Pinebrook, both before and after these dates, which were ignored or rejected by Respondent Pinebrook.

Respondent also relies on the employee petition, filed on July 12, 2006, and the September 14, 2006 petition filed by another union. Neither of these events warrant Respondent Pinebrook's refusing to meet with the Union.[89] As I have detailed above, Respondent Pinebrook had violated Section 8(a)(1) and (5) of the Act by failing to supply information to the Union, and by refusing to meet at reasonable times with the Union between November 12, 2005, and at least July 12, 2006. Thus, these unremedied unfair labor practices, preclude Respondent Pinebrook from relying on such petition to justify refusing to meet with the Union. *A T Systems West,* 341 NLRB 57, 59–61 (2004).

As for the representation petition filed by another union on September 14, 2006, such a petition does not relieve Respondent Pinebrook of its obligation to bargain with or meet with the Union. D*resser Industries,* 264 NLRB 1088, 1089 (1982); *RCA Del Caribe,* 262 NLRB 963, 965 (1982).

As for Respondent's conduct subsequent to the January 24, 2007 meeting, although the Union made no additional written requests to bargain after that meeting, it did, by Alcoff request that Jasinski set up another meeting. Jasinski would not do so at that time, since he did not have his calendar. Jasinski wanted to resolve the merit bonus issue, before scheduling another meeting. The Union agreed. However, after the parties resolved the merit bonus issue, Jasinski did not as he had promised, schedule another meeting. I therefore find that Respondent Pinebrook has continued to fail to meet with the Union at reasonable times from November 2005 to date.

Accordingly, I conclude that by such conduct Respondent Pinebrook has violated Section 8(a)(1) and (5) of the Act.

C. The Alleged Unilateral Elimination of the 40-Percent Cap in Agency Usage

The General Counsel contends and the complaint alleges that Respondents Monmouth and Pinebrook violated Section 8(1) and (5) of the Act by unilaterally changing terms and conditions of employment of their employees, by exceeding the 40-percent cap on the usage of agency employees. *St. George Warehouse, Inc.,* 341 NLRB 904, 905–906, 924–925 (2004)

[88] Jasinski testified that in response to a call from Marvin Hamilton, union business agent, he agreed to a meeting at Respondent Pinebrook for January 17, 2008. The record does not reflect whether that meeting was held or what transpired at such meeting.

[89] Of course even if these items justify Respondent Pinebrook's refusal to meet with the Union, they cannot justify such refusal prior to July 12, 2006.

(violation of 8(a)(5) of the Act to unilaterally transfer bargaining unit work to temporary employees).

The amended compliant alleges that both Respondents "since on or about September 1, 2006 eliminated the 40% cap on the use of Agency members performing bargaining unit work." The record is unclear as to how and why the General Counsel selected September 1, 2006, as the date of the unilateral charge. I suspect the date was chosen because that it is the date alleged in the charge, and that such date would be within the 10(b) period.

However, the record contains no evidence that either Respondent made any announcement to employees or notification to the Union, that as of September 1, 2006 (or any other date for that matter), that they were discontinuing or eliminating the 40-percent cap on the use of agency employees. Indeed, the record reflects that Respondents have consistently maintained that they have been in full compliance with the cap.

In order to establish a violation of a unilateral change, the General Counsel must establish what the terms and conditions of employment were before the alleged change, and then establish what the terms and conditions of employment were after the change, and then comparing the two. *Golden Stevedoring Co.,* 335 NLRB 410, 435 (2001). A unilateral change is measured by the extent to which it departs from the existing terms and conditions affecting employees. *Crittenton Hospital,* 342 NLRB 686 (2004); *Southern California Edison Co.,* 284 NLRB 1205 fn. 1 (1987).

Here, the General Counsel adduced no evidence of any "change" in Respondents compliance with agency usage on September 1, 2006, or at any other time. Indeed, Alcoff's position paper, which formed the basis for the complaint, asserted the Respondent Monmouth had violated the cap as far back as June 2006, and the General Counsel's evidence and brief asserts that the cap was violated in August 2006.[90] Accordingly, I agree with Respondents that the failure of the General Counsel to establish a "change" within the 10(b) period is fatal to its complaint allegation.

Moreover, even assuming that the General Counsel overcomes that hurdle, I conclude that the General Counsel has also failed to meet its burden of establishing that Respondents have violated the contractual restriction on agency usage after September 1, 2006, as alleged in the complaint. While the calculations submitted by the General Counsel would tend to establish that both Respondents have exceeded the cap,[91] Respondents vigorously dispute the methodology used by the General Counsel, in two important respects.

First, Respondents contend that "total staffing" in the contract means both bargaining unit and agency employees. The General Counsel's calculations and the Union's position is that total staffing refers only to bargaining unit employees. Secondly, Respondents claim that the violation of the cap must be measured over a 1-year period. The General Counsel's position is that at "*no time*" is either facility allowed to exceed the 40-percent cap. Her calculations measure the use of agency personnel on a weekly basis.

I note that Respondents have submitted their own calculations, which were based on their position as to the issues, and which reveal for 1-year periods, that neither Respondent exceeded the 40-percent cap.

The record evidence concerning the meaning of the contractual provision concerning these issues, is not substantial. An examination of such evidence reveals the undisputed conclusion which I make, that the clause is ambiguous as to these matters. In this regard, Jasinski and Harris who were both present at and involved in the 2001 negotiations when the clause was negotiated, testified that it was their "understanding"[92] based on these negotiations, that the 25-percent figure was to be measured over a 1-year period.

Further, I have credited Harris' undenied testimony, that during the 2002 negotiations, when the cap was raised to 40 percent, the union official, Stacy Harris, specifically agreed with the position of Respondents, that the 40-percent cap is measured on a 1-year period. Notably, Stacy Harris did not testify in this proceeding. Further, the General Counsel presented no witnesses to testify concerning the 2001 or 2002 negotiations. Thus, Jasinski and Eleanor Harris' testimony is not refuted. Thus, although not exactly conclusive, this evidence supports Respondents version of the meaning of the clause.

Furthermore, during the 2004 arbitration over the grievance filed by the Union alleging that Respondent Milford had violated the 40-percent cap, Jasinski on behalf of Respondent Milford took the position that the 40-percent cap is computed on a yearly basis. The Union's attorney at the time, did not disagree or agree with Jasinski's assertion, but stated that the language is unclear in terms of whether it is calculated as a weekly, monthly, or yearly basis.

Additionally, at the January 2007 bargaining session at Respondent Pinebrook, Alcoff asked Jasinski how the 40-percent cap was calculated, and Jasinski responded that it was over a 1-year period. Significantly, Alcoff did not dispute that interpretation at the time.

Finally, when Respondents sought documents from A-Best, pursuant to the Union's information request, Harris wrote in such letter that the "40% shall be cumulative based on the yearly schedule."

With respect to the definition of total staffing in the clause, Jasinski testified that during the 2001 negotiations, when the clause was first negotiated, it was discussed and agreed between the parties that the 25 percent would be based on "total staffing," and it was his "understanding" that total staffing

[90] I note that the alleged unilateral changes in June and early August would be barred by Sec. 10(b) of the Act, a defense raised by Respondents in their answer. In that regard, the record discloses that the Union was aware of potential cap violations by statements from employees as far back as 2005, and raised the issue with Respondents during bargaining.

[91] These calculations indicates that Respondent Monmouth exceeded the 40-percent cap in 53 out of 60 weeks, and Respondent Pinebrook in 59 out of 60.

[92] I note that Jasinski's testimony was vague as to what specifically was said by either party during the negotiations, that led him to this "understanding."

meant bargaining unit employees plus unit employees.[93] Once more, no union official was called as a witness to refute Jasinski's testimony in this regard.

The General Counsel relies on the Union's proposal submitted on August 19, 2005, which states that the 40 percent should be calculated based on "the bargaining unit's total employees." The General Counsel also relies on a letter from Jasinski to Julie Pearlman Schatz, the Union's attorney at the time, dated June 1, 2006. In this letter, which involved Respondent Milford's alleged compliance with the prior Board Order, Jasinski used the term "bargaining unit work," in explaining why such work was assigned to agency employees.

However, Respondents note that the information request made by the Union, which Jasinski responded to in that letter, and which was quoted therein, asked for "total number of shifts worked in each title inclusive of Agency personnel."

The issue of how to define "total staffing" never came up in any of current negotiation sessions. However, both Foley and Alcoff concede in their testimony that the clause is ambiguous and unclear. Foley admitted that "reasonable people could disagree around the interpretation of what that means."

Based on the above evidence, as well as my reading of the clause itself, I conclude as related above, that the clause in question is ambiguous as to the issues of how to define "total staffing," and what time period to use to calculate the 40-percent cap on agency usage.

In such circumstances, I conclude that both Respondents and the General Counsel have presented "plausible interpretations" of the contract. Such a finding is insufficient to find a violation of the Act, since as long as Respondents have a "sound arguable basis," for its interpretations of the contract, no violation will be found. *Verizon,* 350 NLRB 542, 568 (2007); *Bath Iron Works,* 345 NLRB 499, 502 (2005), enfd. 475 F.3d 14, 22 (1st Cir. 2007); *Intrepid Museum,* 335 NLRB 1117 (2001); *Westinghouse Electric,* 313 NLRB 453 (1993); *Atwood & Morill,* 289 NLRB 794, 795 (1988); *NCR Corp.,* 271 NLRB 1212, 1213 (1984).

Here, I find that Respondents have a "sound arguable basis" for their interpretations of the contract, which leads to the conclusion that the General Counsel has not established that Respondents have violated the Act.

In that regard, the calculations made based on Respondents "plausible" interpretation of the contract, reveal that over a 1-year period Respondent Monmouth used agency personnel 35.0 percent, and Respondent Pinebrook 40.48 percent. I agree with Respondents that it is a "plausible" interpretation of the contract to round the 40.48 to 40 percent to find that Respondent Pinebrook did not exceed the 40-percent cap. Moreover, I conclude that a finding that Respondent Pinebrook exceed the cap by 0.48 percent does not represent a "material, substantial, or significant" change in terms and conditions of employment, and no violation has been established. *Crittenton Hospital,* supra at 686; *Fresno Bee,* 339 NLRB 1214, 1215–1216 (2003); *Peerless Food Products,* 236 NLRB 161 (1978); *Rust Craft Broadcasting,* 225 NLRB 327 (1976).

Accordingly, based upon the foregoing analysis and authorities, I recommend that the complaint allegations that Respondents Monmouth and Pinebrook unilaterally eliminated the 40-percent cap be dismissed.

CONCLUSIONS OF LAW

1. The following employees constitute units appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

(a) All employees employed by Respondent Monmouth at its Long Branch, New Jersey facility, including all registered nurses, office clerical employees, supervisors, watchman and guards.

(b) All employees employed by Respondent Milford at its West Milford, New Jersey facility, excluding all registered nurses, licensed practical nurses, office clerical employees, supervisors, watchmen and guards.

(c) All licensed practical nurses employed by Respondent Milford at its West Milford, New Jersey facility, excluding supervising employees.

(d) All registered nurses, excluding only the director and assistant director by Respondent Milford at its West Milford, New Jersey facility, excluding supervisory employees.

(e) All employees employed by Respondent Pinebrook at its Englishtown, New Jersey facility, excluding all registered nurses, office clerical employees, supervisors, watchmen, and guards.

(f) At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the above described units.

2. The Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply timely and complete information requested by the Union orally and in its letters of August 30, September 12, October 10, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

3. Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet at reasonable times with the Union, since November 3, 2005.

4. Respondents have not violated the Act in any other manner as alleged in the complaint.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have committed various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondents supply the requested information to the Union (other than information already turned over to the Union, or information that does not exist). To the extent that Respondents continue to assert that some of the information is not in its possession, but in the possession of the agencies, I shall recommend that Respondents make reasonable efforts to secure any unavailable information, and, if ay infor-

[93] Once again, Jasinski did not testify specifically to what his "understanding" was based upon, nor whether any union representative present, confirmed such an understanding.

mation remains unavailable, explain and document the reasons for their continued unavailability. *Garcia Trucking Service,* 342 NLRB 764 fn. 1 (2004); *Milford Manor,* supra.

Turning to the issue of Respondents' failure to meet with the Union at reasonable times, I have found that Respondents, have flagrantly violated Section 8(a)(1) and (5) of the Act by such conduct. Respondents Monmouth and Milford have failed to meet with the Union since August 2005, and Respondent Pinebrook failed to meet with the Union from November 3, 2005, to January 23, 2007, and from January 23, 2007 to date.[94]

While normally the Board's remedy for such a violation is simply a cease and desist Order and an affirmative order to meet and bargain with a Union, *Laurel Bay,* supra; *Barclay Caterers,* supra, I believe that here a more appropriate remedy is to require Respondent's to adhere to a schedule for meetings.

Such a remedy was proposed by former Board Member Murphy in *Leavenworth Times,* 234 NLRB 649, 650–651 (1978), but was not accepted by the majority. Notably, however, the majority while conceding that the Board, in appropriate circumstances is capable of providing other than the usual relief in order to rectify particular unfair practices, did not find it appropriate to do so there. The Board noted in that regard, citing *Crystal Springs Shirt Co.,* 229 NLRB 4 (1977), that while respondent's conduct was found to be in bad faith, its behavior was "not so egregious, nor its defenses frivolous," that the usual remedies are inadequate or will fail to remedy entirely the unfair labor practices.

Here, I have found that Respondents' conduct in failing to meet with the Union was flagrant and egregious, and that some of its defenses, i.e., that there was an "impasse" in bargaining was bordering on the "frivolous." In such circumstances, I believe that a bargaining schedule is appropriate here to properly remedy the unfair labor practices, committed by Respondents.

I recognize that former Member Murphy's view was not only not accepted by the majority, but has not been followed in other Board cases. Indeed, the Board has specifically rejected the ALJ's proposed remedies based on the dissent in *Leavenworth,* supra; *Eastern Maine Medical,* 253 NLRB 224, 228 (1980), enfd. 658 F.2d (1st Cir. 1981); *Professional Eye Care,* 289 NLRB 1376 fn. 3 (1988).

However, I also note that the Board has approved a somewhat more stringent remedy in *Calex Corp.,* 322 NLRB 977, 981 (1997) (affirming requirement that the employer "comply with the Union's request for more frequent bargaining sessions").

Further, the Board has been successful in persuading courts in contempt proceedings to order such schedules. *NLRB v. Schill Steel Products,* 480 F.2d 586, 598 (8th Cir. 1973) (15 hours per week, unless the union agrees to fewer); *Straight Creek Mining v. NLRB,* 2001 WL 1262218, 143 Lab Cas. P 11,053 (6th Cir. 2001) (ordering bargaining at least once a week, unless the union agrees otherwise); *NLRB v. H & H Pretzel Co.,* mem. 936 F.2d 573 (6th Cir. 1991) (3 days per week during regular business hours, unless the union agrees to fewer meetings during a particular week); *NLRB v. Johnson Mfg. of Lubbock,* 511 F.2d 153, 156 (5th Cir. 1975) (ordering bargaining to proceed in "reasonably consecutive sessions").

I, of course, recognize that the above cases are contempt cases, where the respondents have been in violation of Board and court orders, which is not present here. Nonetheless, I believe that these cases are instructive in persuading the Board, that such a remedy can be appropriate in a non contempt situation, as in the present case.

I do detect a recent Board tendency to put more teeth into remedying refusal to bargain cases. *Dish Network,* 347 NLRB No. 69, ALJD slip op. 30–31 (2006) (not reported in Board volumes); *Regency Service Carts,* 345 NLRB 671, 676–677 (2005). In both of these cases, the Board ordered the payment of negotiation expenses of the union to be paid to the union by the employers, who were found to have engaged in bad-faith bargaining. While there is no surface bargaining allegation here, and therefore negotiation expenses are not appropriate, I nonetheless rely on *Regency Service* and *Dish Network* to support my recommendation for a set schedule of meetings. The Board recognized the need in *Regency Service,* supra, for fashioning nontraditional remedies, even where as here, the General Counsel has not requested such a remedy. It emphasized the "broad discretion that the Board has in determining the appropriate remedies to dissipate the effects of unlawful conduct." Id. at 677. I believe that this is such a case, and an appropriate schedule is warranted to dissipate the effects of Respondents egregious and flagrant conduct.

I go back to *Leavenworth Times,* supra, where former Member Murphy not only recommended a set schedule, but also the remedy of reimbursing the Union for bargaining expenses. The Board majority there disagreed with the remedy proposed by former Member Murphy, and characterized the remedies as "extraordinary." Since *Regency Service* and *Dish* establish that bargaining expenses are not so "extraordinary," as to preclude the Board from ordering such a remedy, I believe that a schedule for bargaining is similarly not so "extraordinary," and is appropriate is the circumstances of this case.

I shall therefore recommend what I deem to be a reasonable schedule for bargaining for the three Respondents. Considering the fact that the Board has yet to authorize such a remedy, I believe a relatively conservative approach should be recommended. I shall therefore recommend the least restrictive remedy of the contempt cases cited above, and select a requirement of meeting once a week, until agreement on a contract or good-faith impasse. *Straight Creek Mining,* supra.[95]

I am also cognizant of the fact that all three Respondents are represented by the same attorney, and the same human resource official of the management company for all three Respondents has been present at each session. Arguably, these facts could cause some hardship to Respondents, but this is not a sufficient

[94] While there is some vague reference in the record to a possible meeting between the parties in January 2008, the record does not establish whether such a meeting took place, or what transpired at such meeting. Nonetheless, whether or not such a meeting was held does not affect my conclusion that Respondent Pinebrook flagrantly violated its obligation to meet with the Union at reasonable times.

[95] Of course nothing in this decision prevents the parties from meeting more frequently than once per week, which I heartily encourage.

excuse to warrant reconsideration of this remedy. It is the responsibility of Respondents to select an attorney who will be available to meet at reasonable times. The Board does not accept the excuse that the attorney is busy on other matters. *Calex Co.,* supra; *A. H. Belo,* 170 NLRB 1558, 1565–1566 (1968).[96]

However, this leads me to another issue, which I also believe justifies an additional requirement to fully remedy the violations found. This additional remedy would somewhat alleviate the potential hardship from requiring all three Respondents to bargain at least once a week with the Union. The record reflects that all three Gericare facilities have the same owners, are operated by the same management company, share the same human resources director, and are represented by the same attorney. All three Respondents have a history of combined collective bargaining. Although they normally sign separate contracts, the MOUs signed in 2001 and 2002 were not only bargained jointly, but resulted in a single document signed by the parties. Notwithstanding this bargaining history, Respondents adamantly refused the Union's request to bargain this renewal contracts jointly, as in the past. Jasinski asserted that each Employer had different interests and concerns, and insisted on separate bargaining for these negotiations. However, these alleged different interests and concerns did not manifest themselves during the bargaining that did take place. The proposals submitted by all three Respondents to the Union, as well as the proposals submitted by the Union to three Respondent's were substantially identical, as was the discussion over these proposals at the sessions. Further, the Union made virtually identical information requests to each Respondent, which resulted in virtually identical responses from Respondents.

While it is not alleged, and I do not find that Respondents' decision to forgo joint bargaining was unlawful, I do find that this action exacerbated the unfair labor practices that I have found herein, the refusal to meet at reasonable times, as well as the failure to supply information.

In that regard, an examination of the record reveals that part of the negotiations that were held consisted of time wasted in discussing why Respondents would not bargain jointly as in the past. Further, the record reveals that when scheduling the few meetings that Respondents agreed to, it was always necessary to coordinate the schedules of Jasinski and Harris. Indeed, in the many letters sent by the Union requesting dates for meetings, wherein Alcoff would state the Union's availability to meet with any or all of the Respondents, the letter would always remind Jasinski that the parties would need to coordinate the scheduling of these dates around the other facilities represented by Jasinski for which the same dates were offered.

Accordingly, in my judgment, in order to properly remedy the flagrant violations that I have found, I deem it appropriate to order all three Respondents to bargain with the Union jointly.[97] I emphasize that this Order is not a finding that the Respondents are a single or joint employers, or that the units should be changed, or that the parties should or must sign a single contract. Rather, such an Order is necessary in my view to ensure the proper remedying of the unfair labor practices that I have found above.

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[98]

ORDER

A. The Respondent, Monmouth Care Center, Long Branch, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercising of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

(b) At the option of the Union, such bargaining sessions shall be held jointly with Milford Manor Nursing Home and Rehabilitation Center and Pinebrook Nursing Home.

(c) Furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

(d) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(e) Within 14 days after service by the Region, post at its facility in Long Branch, New Jersey, copies of the attached notice marked "Appendix A."[99] Copies of the notice, on forms pro-

[96] I note that in *A. H. Belo,* supra, the Board concluded that a fixed schedule imposed by the employer of meeting once a week for two hours was insufficient to meet the employer's obligation to meet at reasonable times. Thus, my recommendation to require meetings of at least once a week, does not appear to be overly harsh.

[97] The Union shall have the option to bargain separately if it so chooses.

[98] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[99] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

vided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Milford Manor Nursing Home and Rehabilitation Center, West Milford, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercising of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

(b) At the option of the Union, such bargaining sessions shall be held jointly with Monmouth Care Center and Pinebrook Nursing Home.

(c) Furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

(d) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(e) Within 14 days after service by the Region, post at its facility in West Milford, New Jersey, copies of the attached notice marked "Appendix B."[100] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The Respondent, Pinebrook Nursing Home, Englishtown, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with SEIU New Jersey Health Care Union (the Union) by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

(b) Failing and refusing to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of its unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercising of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

(b) At the option of the Union, such bargaining sessions shall be held jointly with Milford Manor Nursing Rehabilitation Center and Monmouth Care Center.

(c) Furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

(d) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(e) Within 14 days after service by the Region, post at its facility in Englishtown, New Jersey, copies of the attached notice marked "Appendix C."[101] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

[100] See fn. 99, supra.

[101] See fn. 99, supra.

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 10, 2008

APPENDIX A

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail nor refuse to bargain in good faith with the Union by failing to meet with SEIU 1199 New Jersey Health Care Union (the Union) at reasonable times for the purposes of collective bargaining.

WE WILL NOT fail nor refuse to timely and completely supply information to the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercising of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

WE WILL at the option of the Union, conduct such bargaining sessions jointly with Milford Manor Nursing Rehabilitation Center and Pinebrook Nursing Home.

WE WILL furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

MONMOUTH CARE CENTER

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail nor refuse to bargain in good faith with the Union by failing to meet with SEIU 1199 New Jersey Health Care Union (the Union) at reasonable times for the purposes of collective bargaining.

WE WILL NOT fail and refuse to timely and completely supply information the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercising of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

WE WILL at the option of the Union, conduct such bargaining sessions jointly with Monmouth Care Center and Pinebrook Nursing Home.

WE WILL furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

MILFORD MANOR NURSING AND REHABILITATION CENTER

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail nor refuse to bargain in good faith with SEIU 1199 New Jersey Health Care Union (the Union) by failing to meet with the Union at reasonable times for the purposes of collective bargaining.

WE WILL NOT fail and refuse to timely and complete supply information the Union that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercising of the rights guaranteed them by Section 7 of the Act.

WE WILL on request, bargain with the Union at reasonable times in good faith until full agreement is reached or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Such bargaining sessions shall be held no fewer than one time per week unless the Union agrees otherwise.

WE WILL at the option of the Union, conduct such bargaining sessions shall be held jointly with Monmouth Care Center and Milford Manor Nursing and Rehabilitation Center.

WE WILL furnish to the Union in a timely and complete manner, the information in the Union's letters of August 30, September 12, and November 2, 2005, January 20 and 24, February 27, March 13, and June 23, 2006.

WE WILL make a reasonable effort to secure any unavailable information requested in the Union's letters described above, and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

PINEBROOK CARE CENTER